

CASES
ARGUED AND DETERMINED IN THE
SUPREME COURT OF LOUISIANA,
AT MONROE,
IN
JUNE 1886.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ,* *Chief Justice.*

Hon. FÉLIX P. POCHÉ,

Hon. ROBERT B. TODD,

Hon. CHARLES E. FENNER,

Hon. LYNN B. WATKINS,†

} *Associate Justices.*

No. 1139.

THE STATE OF LOUISIANA VS. WESTLEY GAUTHREAUX ET ALS.

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The provision of the Constitution (Art. 8) touching witnesses in criminal cases, applies to witnesses on the question of the guilt or innocence of the accused, and has no reference to motions for new trials or other proceedings connected with a criminal cause.

The Supreme Court will not disturb the rulings of trial judges, in their manner of fixing and hearing motions for new trials or similar proceedings unless the same appear on their face arbitrary or glaringly unjust.

Evidence intended to impeach the testimony of witnesses on the trial is not a legal ground for a motion for a new trial on the ground of newly discovered evidence.

A PPEAL from the Twenty-second District Court, Parish of Ascension. *Duffel, J.*

M. J. Cunningham, Attorney General, and *J. L. Gaudet*, District Attorney, for the State, Appellee:

ON MOTION TO DISMISS.

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*Absent during the whole of this term on account of illness.

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State vs. Gauthreaux et als.

ON MERITS.

A motion for a new trial on the ground of newly discovered evidence must be refused when the affidavit of the accused shows that the evidence, so far from being newly discovered, was known to him all the while. Such motion must be supported by other testimony in addition to the affidavit of the accused. His alone will not suffice. *State vs. J. J. Cotton*, 36 Ann. 989.

Newly discovered evidence tending to impeach or discredit a witness who has testified in the case affords no legal ground for setting aside the verdict and granting a new trial. *State vs. Lou Young and Joseph E. Barbo*, 34 Ann. 346; *State vs. Henderson*, 35 Ann. 45.

E. N. Pugh for Defendants and Appellants.

The opinion of the Court was delivered by

POCHÉ, J. Westley Gauthreaux seeks relief from a sentence for murder without capital punishment, on the ground that he was improperly denied a new trial.

He also complains of the judge's refusal to fix a day for the hearing of his motion for a new trial, which was predicated on alleged newly discovered evidence, and of his refusal to issue process intended to secure the attendance at that hearing of the witnesses whose evidence he claimed to have discovered since the trial.

The record shows that the verdict of the jury was rendered on May the 13th, and the motion for a new trial was presented on the 19th of the same month. The judge ordered the motion to be taken up *instanter*, and after hearing he overruled it.

It is charged that the ruling was erroneous and injurious to the accused, and the rules of the court are in the record to show that the judge violated his own rules. But the very rule invoked by the accused authorizes the judge to fix certain motions for trial *instanter*.

But the method of hearing motions for new trials is a matter which must be left to the sound discretion of the trial judge, and surely this Court cannot be expected to review every movement of a district court in the disposition of its business.

If the mere reading of a motion for a new trial imparts to the judge, who has followed up and directed the whole trial, sufficient knowledge to intelligently dispose of the matters suggested in the motion, he cannot be arbitrarily required to delay his ruling for the purpose of further hearing in the premises.

In Boasso's case recently decided in New Orleans, this Court upheld the trial judge in his refusal to hear argument of counsel in support of a motion for a new trial, the judge stating that he was

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already familiar with and ready to dispose of the questions submitted in the motion.

There is no merit in defendant's contention that he had the constitutional right to "compulsory process for obtaining witnesses in his favor," in support of a motion for a new trial. That provision (Constitution, art. 8) has reference to witnesses for the trial of the guilt or innocence of the accused, and surely does not cover the hearing of every motion or other proceeding incidental to or connected with the main trial.

Under the interpretation suggested by defendant, accused parties would soon monopolize the time of the court and form a constant procession of witnesses to the court-house, whose presence and whose hearing would indefinitely procrastinate and eventually paralyze the administration of justice.

His contention finds no support in Hyland's case, 36 Ann. 88, on which he relies. The ruling in that case was that the trial judge should hear the witnesses whom the accused produces in support of the averments of his motion for a new trial, and his refusal in that case to hear them was discountenanced. But nothing in the opinion justifies the inference that in such a proceeding the accused is entitled to process for witnesses. The substance of the ruling is that the judge must either hear the witnesses if produced or receive and consider their affidavits in corroboration of that of the accused.

But in the instant case the defendant did not present or annex the affidavit of the witnesses referred to in his motion, or of any other person in support of his motion.

And his reasons for his failure to comply with that rule of law are not satisfactory.

The fact that he was in prison and that he had been taken by surprise by the nature of the testimony produced against him at the trial could with as much reason be urged by all convicted parties, and yet the rule is absolute and has always been enforced in criminal jurisprudence. *State vs. Cotton*, 36 Ann. 980; *State vs. Jung & Britto*, 34 Ann. 346.

But notwithstanding this material omission of the defendant in the matter of his motion, we have considered the nature of the alleged newly discovered evidence which he therein sets up.

Its intended effect was double in its scope.

By one set of witnesses he proposed to show justification for the homicide with which he was charged, and by another set he proposed

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to impeach the testimony of witnesses who had sworn to certain admissions made by him in connection with the crime for which he was prosecuted.

The witnesses whom he desired to produce in support of his alleged justification were in the same house with him at the time of the homicide, and their alleged version of the deed must have been known to him at the time as the truth of the facts which he holds out, and hence their testimony cannot be considered as newly discovered evidence.

If it be true, as he contends, that the deceased was about to break into the house of the person who is represented as having called on the accused for assistance, he must have known these things not only at the time of his trial, but at the very moment of the homicide; and the credulity of courts cannot be strained to the point of believing that such evidence was discovered only since the trial.

The intention to impeach the testimony of witnesses as given at the trial is not a legal ground for a new trial. The rule has been too long in force and is too firmly settled in jurisprudence to require any argument in its support at this time. *Waterman's Criminal Digest*, p. 459, sec. 208; *State vs. Fahey*, 35 Ann. 9; *State vs. Diskin*, 35 Ann. 46.

From the record it appears that the accused had six days within which to prepare his motion for a new trial and to secure either the presence or the affidavits of witnesses whose testimony he pretends to have discovered since his trial, and his failure to present them or their corroborating affidavits must be attributed to his own laches, and cannot be traced to the rulings of the trial judge, who has committed no errors under the law.

Judgment affirmed.

No. 1140.

SUCCESSION OF MRS. MARY A. MYRICK.

PROVISIONAL ACCOUNT AND OPPOSITIONS THERETO.

An administrator is not compelled to sell the working animals to pay the debts apart from the plantation. They are immovable by destination, and if they die during the term of the administration the administrator is not to be charged with their value in the absence of fault or negligence on his part.

Nor should an administrator be charged with the annual rents of the plantation, where, after the proper efforts, he has been unable to lease the plantation to a suitable tenant, and has been compelled to work the place on account of the succession. In such case he is subject to no charge for rents or for failure to make adequate crops where it is not shown that such failure is attributable to his fault.

A PPEAL from the Twenty-seventh District Court, Parish of Richland. *Montgomery, J. ad hoc.*

 Succession of Myrick.

R. G. Cobb for the Administrator, Appellant.

Wells & Toler for Opponent *Watson*.

Potts & Hudson for Tutor, *Myrick* :

1. The administrator should, within ten days after his appointment, advertise and sell all the personal property of the succession. C. C. 1163, 1049, 1051.
2. If he fail to sell when required by law to do so and the property wastes or perishes, he must account or pay for the property.
3. He should lease the real estate if not necessary to sell it and account for the revenues. If he made no effort to lease and use the property himself, he must pay customary rents.
4. The wife cannot bind herself nor her property for the debts of her husband. C. C. 2398; 33 Ann. 1009 and case.
5. The law forbidding such contracts is prohibitory. 14 Ann. 9 L. 590.
6. Married women are never estopped when sought to be made liable for the debts of their husbands, and many show the true nature of the contract. 14 Ann. 168; 16 Ann. 11; 12 Ann. 852; 12 R. 84; 1 Ann. 429; 2 Ann. 756; 14 Ann. 169; 4 R. 508; 33 Ann. 1009.
7. The heirs have all the rights of the deceased. C. C. 945; 7 R. 183; 15 Ann. 528; 19 Ann. 75; 33 Ann. 1009.
8. Neither can the wife indulge in wild and ruinous speculations and bind her property therefor. 34 Ann. 976; 16 Ann. 214; 29 Ann. 75.

M. J. Liddell for Opponent *Slayden* :

1. The doctrine of estoppel is applicable to married women whenever they seek to perpetrate deliberate frauds. 33 Ann. 626; 37 Ann. 327.
2. An estoppel which binds the deceased married woman, will bind her legal heirs. 1 Green, § 523.
3. Where a married woman has compromised a pending litigation, and confessed judgment in favor of one who is a solidary mortgage creditor of herself and unmarried brother whereby she obtains the reduction of her debt and the surrender of the mortgage notes, which she uses in purchasing her brother's entire landed estate; her nephew and niece claiming as her heirs at law will be estopped from denying the consideration of the confession of judgment.
4. Wherever a person by declarations and acts induces another to believe in a certain condition of things, or to change or alter his position for the worse, neither that person or his heirs will be heard to deny his acts or declarations so acted on. 26 Ann. 289; 2 Ann. 500; 26 Ann. 298; 28 Ann. 138; 30 Ann. 53; 32 Ann. 1103; 33 Ann. 624; 33 Ann. 408; 38 Ann. 324; Big on Stoppel, 473, 477.
5. A married woman with her husband's consent may become surety for any other person. 2 Ann. 903.
6. A married woman may become surety with her husband's consent for a person with whom he is engaged in a partnership. 33 Ann. 924; 4 Ann. 377; 19 Ann. 48; 2 Ann. 903.
7. The right to annul a confession of judgment on the part of the wife, given with the husband's consent, for the reason that the judgment confessed was for a community debt is a right personal to the wife or her forced heirs, and cannot be exercised by those whom the law calls to the inheritance in default of ascendants or descendants. 5 Ann. 369; 3 Ann. 426.

The opinion of the Court was delivered by

TODD, J. Mrs. Mary A. Myrick died in the parish of Richland in 1880, and her surviving husband, Benj. Myrick, was appointed administrator of her succession the same year.

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On the 26th of November 1884, the administrator filed a provisional account of his administration. This was opposed by the legal heirs of the deceased—minors acting through their tutor, Ed. Myrick—also by two creditors, Slayden and Watson.

I.

There were certain grounds of opposition urged by both heirs and creditors.

They were: 1st. Charging the administrator with the loss of a number of working animals that had died during the term of his administration and valued at \$470, and also for 25 head of cattle that likewise died; and 2d. With five years' rentals of the plantation at \$1500 per annum.

It is not charged that the mules and cattle died from neglect of the administrator—and such was not the case; but that he was liable for their value because he had failed to sell them seasonably to pay the debts of the succession.

The administrator took charge of the plantation stocked and ready for cultivation. There was little or no movable property, strictly speaking, belonging to the succession. The mules, which it is contended he should have sold in ten days after his appointment, were the working animals of the plantation, and therefore immovable by destination—in legal contemplation, a part of the plantation. It was no more the administrator's duty to have sold these working animals and small stock of cattle than it was to have disposed of the farming implements, mill, gin stand, machinery, and thus denude the plantation of everything required for its successful cultivation.

It was his duty to have leased the plantation if he could, but we are satisfied from the testimony of the administrator and of Ed. Myrick, the tutor of the opposing heirs, that this was impossible. The plantation contained at least 400 acres of open land—a large plantation for that section of the country, inhabited principally by men of small means, who, as a general rule, had more land than they could cultivate themselves.

The situation was such that the administrator was compelled to cultivate the plantation himself or abandon it to waste and ruin. He adopted the former and doubtless wise alternative to cultivate it himself on account of the succession, which he did; and though it resulted unfavorably and produced no revenue for the succession, yet it preserved this valuable in good condition and saved it from great injury, if not the total ruin that might have resulted from its abandonment.

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Besides, it was entirely within the power of the heirs, who were present and represented by their tutor, and the creditors, who are now making their complaint for the first time, to have had this property sold had they desired it, by making application therefor and procuring the required order for its sale; but they were silent all those years, uttering no disapproval and evidently acquiescing in the course pursued by the administrator.

We find no reason and know of no law, *under these circumstances*, that would compel the administrator to pay for the mules and cattle that died, or for the rent of the plantation; and the judgment of the lower court, so far as it imposes the former liabilities upon him, must be reversed.

II.

The administrator asked credit in his account for certain privileged debts and necessary charges paid by him. They consist mainly of the expenses of last illness, of funeral expenses, law charges, taxes, blacksmith's account for repairing machinery, etc., amounting in the aggregate to \$1086.28. These items were not opposed and were accompanied by proper vouchers, and their correctness proved by direct testimony, and yet they were rejected. This error must be corrected and the proper credit given for these items.

III.

The administrator has placed in his account as a just claim against the succession a judgment against the deceased, rendered on her confession for \$3,600, subject to a credit for \$1,950, in favor of Beaumont, Fakes & Co., and then held by W. J. Slayden under assignment from them.

For several years after his marriage, the plantation in question was cultivated by Myrick on his own account. That was before his wife had obtained a judgment separating her in property from him. By an examination of the record of the proceedings in the suit wherein Slayden's judgment was rendered, it will appear that the consideration of the judgment was a debt of her husband's. It was an account for advances made to the husband of plantation supplies, etc., whilst a community existed between the spouses and when Myrick was cultivating the plantation on his own account. Mrs. Myrick, according to this record, owed no part of the debt for which she confessed judgment. It further appears, however, from the evidence in the record that in 1871, Myrick, who had been cultivating the plantation on his own account, formed a planting partnership with his brother-in-law John F. Raines, under the firm name of Myrick & Raines, who continued planting together for

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several years. As collateral security for debts owing by this firm, Mr. Myrick and John F. Raines executed their note *in solido* for \$4,000 in favor of Beaumont, Fakes & Co., the factors of the planting partnership of Myrick & Raines, secured by mortgage.

The account for supplies for which Mrs. Myrick confessed judgment was in part the consideration for which this mortgage note was given. At the date of this judgment, Jno. F. Raines was dead, and his succession was under administration, and his one-half interest in the plantation was to be offered for sale. The creditors of the firm mentioned, Beaumont, Fakes & Co., agreed that if Mrs. Myrick would confess the judgment in their favor above mentioned, that they would surrender to her the mortgage note of \$4,000 of herself and brother they held, and also a like one of \$500. This was done, and with these Mrs. Myrick purchased the one-half interest of her deceased brother in the plantation.

Under these facts, a special plea of estoppel is urged against the right of Mrs. Myrick or her heirs repudiating the judgment confessed by her or questioning her liability under it.

It is true that Mrs. Myrick by confessing judgment for this debt, though a debt she did not owe, obtained the means by which she acquired half interest of her brother in the plantation—in other words she exchanged her confessed judgment for the notes which proved available in her hands to secure for her property of value surpassing the amount of the judgment she had confessed, thus realizing full and complete consideration for it. We are convinced that the heirs of Mrs. Myrick cannot now consistently deny that the judgment should be recognized as valid and binding against her; and that the same was properly reported in the administrator's account as a valid debt against her succession subject to the credit stated. 34 Ann. 1171; 37 Ann. 679. This credit we see no reason to reduce as asked to do in the motion to amend.

IV.

There is a claim allowed by the account in favor of R. U. L. Watson. It was for a number of mules and wagon bought of Huson by Mrs. Myrick, for which she executed her obligation to deliver ten bales of cotton after she was separate in property from her husband. The debt is a just one and the deceased was clearly liable for it.

There was also a claim for \$860, in favor of Thomas Jones, recognized in the account as a just debt against the succession. We are satisfied that the debt is a just one. The creditor, however, moves an amendment to the judgment because the same allowed only the prin-

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cipal. He is entitled to the amendment sought, allowing legal interest from 1st of January, 1880.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be annulled, avoided and reversed :

1. In so far as it rejects the credit claimed by the administrator for the working animals and the cattle that died during the term of his administration, \$470.

2. In so far as it rejects the credit claimed for the privilege debts and necessary charges aggregating \$1,186.28.

In so far as it fails to allow interest on the claim of Thomas Jones for \$860, on which legal interest is now allowed from the 1st of January, 1880.

4. In so far as it charges the administrator with the depreciation in the value of the mules on hand, \$114; and that in all other respects the judgment appealed from be affirmed, opponents to pay costs of their respective oppositions in both courts.

ON REHEARING.

POCHÉ, J. After a second hearing of this case and a second examination of the record, we reach the conclusion that we had committed no error in our previous opinion.

It is, therefore, ordered that our decree remain undisturbed.

No. 1141.

JAMES A. LUSK, FOR USE OF A. DONAN, VS. THOMAS J. POWELL.

When the legal mortgage of a minor on the property of his tutor was originally inscribed after the majority of the former, failure to reinscribe within ten years operates the peremption of the mortgage, which cannot thereafter be enforced against property formerly belonging to the tutor, in the hands of a third possessor.

A PPEAL from the Twenty-seventh District Court, Parish of West Carroll. *Williams, J.*

C. T. Dunn for Plaintiff and Appellant :

1. In selling land at tax sale all the requirements fixed by law must be rigidly complied with on pain of nullity. The necessary proceedings step by step must appear in the tax deed. *Louque*, p. 715, 5, 716, 16; 19 *Ann.* 185.
2. Mortgages perempt. They do not prescribe. The doctrine of prescription is stricti juris. The mode of cancelling a perempted mortgage being fixed by law, this mode is exclusive. Prescription against a perempted mortgage can only be urged in the manner pointed out by law. The party must have the recorder to cancel it. *R. S.* 450.
3. Mortgage is an accessory obligation made to secure the performance of the principal obligation. It takes its vitality from the principal debt and continues to exist as long

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as the principal debt is kept alive. 37 Ann. 88, 809; 25 Ann. 644; 23 Ann. 244; 33 Ann. 1453; 30 Ann. 404, 853; 31 Ann. 284.

4. Minor's mortgage against his tutor is specially exempted from reinscription. As long as it preserves its character of a minor's mortgage against the tutor on account of the tutorship, reinscription is not required by law. It is only when settlement is made contradictory between the minor and tutor and the claim is merged in a judgment that reinscription becomes necessary.

The minor's mortgage against his tutor is exempted from reinscription on grounds of public policy. The minor's mortgage is excepted from reinscription for the same reason that other mortgages are exempted under the law. The Poydras Legacy, the Mortgages of Stock Banks, etc. R. S. 2399, 2340, 2341; 5 Ann. 590.

Newman & Gray and H. P. Wells for Defendant and Appellee:

Where a mortgage once recorded is not reinscribed within the ten years prescribed by law, it perempts and ceases to have effect against third persons. The pendency of a suit to enforce a mortgage does not obviate the necessity of its reinscription. 30 Ann. 11; 25 Ann. 148; 20 Ann. 508; 23 Ann. 587.

When a person reaches the age of majority, the laws of prescription which provide for his protection during his minority cease to govern his actions and rights, and he is subject to the same laws of prescription as other persons. The law dispensing with the registry of the tacit mortgage of minors ceases to protect them the moment they reach their majority. 34 Ann. p. 1042; 35 Ann. p. 945.

The action of the minor against his tutor is prescribed by four years to begin from the day of his majority, and the tacit mortgage given by law against the property of the tutor is extinguished by the same length of time. R. C. C. 362; 20 Ann. p. 510; 4 Ann. 488; 9 Ann. 43.

A mortgage resting on property sold for taxes cannot be enforced. If the formalities of law were observed for the tax sales, the effect of such a sale is to extinguish the mortgage. 28 Ann. 352; 35 Ann. 506; dissenting opinion of Judge Wyly, 29 Ann. 112.

The opinion of the Court was delivered by

FENNER, J. This is an action to enforce a minor's mortgage on property in the hands of a third possessor.

The mortgage was inscribed in 1869, after the plaintiff had attained the age of majority, and was not reinscribed within ten years. By this failure to reinscribe, the mortgage perempts and the effect of the original registry ceased. C. C. 3369.

The exception in favor of minors, married women and interdicted persons, made in the concluding paragraph of the article, has no application to a case like the present, where the disability had ceased when the original registry was made. This has been deliberately and repeatedly decided. Lemle vs. Thompson, 34 Ann. 1041; Smith vs. Thompson, 35 Ann. 943; Watson vs. Boudurant, 30 Ann. 11.

While we listened with interest and attention to the argument of plaintiff's counsel in favor of a reversal of the jurisprudence of this Court on this and other points, we are not convinced of the propriety of doing so, and prefer to hold our course *in antiquas vias*.

Judgment affirmed.

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No. 1146.

THE STATE OF LOUISIANA vs. CHARLES ROBERTSON *alias* LEWIS
ROBERTSON.

A person to whom complaint has been made by the victim of a rape, when placed on the witness stand, cannot be permitted to repeat all the details of the outrage and the name of the ravisher as reported to her, but can only testify as to the fact of the complaint being made and as to the condition of the victim when making the complaint. Such testimony is not to be regarded as independent and original evidence to establish the guilt of the accused, but its purpose is to support the testimony of the person outraged. The counsel for one accused of such crime, who seeks to impeach the testimony of the principal witness by showing contradictions between the statements of such witness made on the preliminary examination and those made on the trial, should be permitted to read parts of the previous deposition and ask the witness if she had so testified, and should not be compelled first to read to her the entire deposition out of the presence of the court and jury.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Roman, J.

M. J. Cunningham, Attorney General, for the State, Appellee.

J. J. Foley for Defendant and Appellant.

The opinion of the Court was delivered by
TODD, J. The defendant appeals from a sentence of imprisonment at hard labor for life on conviction for rape.

The grounds of his appeal appear in two bills of exception found in the record.

I.

One is to the following effect:

The only direct testimony against the accused touching the commission of the offense charged was that of the alleged victim of the outrage.

Another witness was called by the State, who stated that the prosecutrix made complaint to her of the commission of the offense soon after its alleged occurrence, and was proceeding to repeat the details of the affair and to give the name of the offender as told her by the prosecutrix, when objection was made to such disclosures by the witness, on the ground that the matters about which the witness was proceeding to testify were not a part of the *res gestæ* and were therefore inadmissible. The objection was overruled and the witness permitted to state that the prosecutrix said that the accused was the perpetrator of the outrage upon her.

This was error.

The object of calling this witness was not to furnish original or independent proof to support the charge itself, but the sole purpose and

effect of such evidence was to sustain the testimony of the prosecutrix—the principal witness.

We find in Bishop on Criminal Procedure the following expression on this point:

“The principal witness therefore in these cases stands in a particularly delicate situation before the jury; and the law has defined by what methods and within what limits her testimony may be supported or impeached. * * * After this principal witness has testified against the accused, the government may introduce witnesses to sustain her evidence of complaint made by her recently after the occurrence of the alleged outrage, together with evidence, if there is such, of marks of violence seen on her person. But according to the general doctrine, the particulars of the offense, as she stated them, and the name of the person charged by her with committing the crime, cannot thus be produced.” And this doctrine is supported by frequent adjudications.

II.

The prosecutrix or principal witness had testified before the recorder at the preliminary trial, and her testimony had been reduced to writing. On the trial before the district court, and on the cross-examination of this witness, the attorney for the accused produced this previous testimony of the witness given before the recorder, and with a view of laying a foundation for impeaching the testimony of the witness just taken on the trial, by showing discrepancies or contradictions between it and that of the preliminary examination, read to the witness parts of said previous testimony, to be followed by the inquiry whether she had so testified, when objection was made to this mode of proceeding—on what ground it does not appear—and the objection was sustained.

It appears from the bill of exceptions that the trial judge required the counsel to let the witness read the whole of her said previous testimony, if she could read, and if not (such was the case in this instance) then to take the witness into another room, with the district attorney, under charge of a deputy sheriff, and there to read to the witness the whole of her testimony—and then return to the court-room and in presence of the jury and ask the witness if the testimony read to her was correct or not; and then if it appeared that the testimony had been read over to the witness by the recorder before she signed it, and had been signed by her, and had been duly certified as correct by the recorder, and having been admitted to be correct by the witness, that then the whole of said testimony might be read to the jury, but that

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he would not allow counsel to read a part of the testimony or even the whole of it before the witness had thus been given an opportunity to say whether that was the evidence given by her before the recorder. To such ruling of the judge the counsel reserved his bill.

We have no hesitation in saying that the counsel was proceeding regularly and properly when thus summarily stopped. We know of no law and have referred to none which requires all this circumlocution and circuitry of action imposed by the trial judge as a condition precedent to the accomplishment of the purpose had in view by the counsel of the accused. He was, in our opinion, strictly in line when these requirements were made upon him, and he was entirely justifiable in declining to accede to them.

We are satisfied that the accused was seriously prejudiced by these erroneous rulings, and by reason of the same the case must be remanded.

It is therefore ordered, adjudged and decreed that the verdict of the jury in the lower court be set aside, and the sentence of the court be avoided and reversed, and the case remanded to be proceeded with according to law and the views herein expressed.

No. 1142.

LUCINDA AND A. MCGUIRE WILLIAMS AND HUSBANDS VS. THE WESTERN STAR LODGE NO. 24 OF FREE AND ACCEPTED MASONS OF MONROE.

1. Private corporations must be authorized by the legislature or established according to law. When legally established, they may hold real estate, and receive legacies and donations.

They may enact statutes and by laws for their government.

The right of succession is inherent to their nature, and they transmit their successions and their rights of property.

2. A corporation cannot fulfill another office of public or personal trust.
A corporation legally established may be dissolved by an act of the legislature, if they deem it necessary for the public interest.
3. The Grand Lodge was incorporated by an act of the legislature in 1816, and given full powers to hold real estate and to receive donations and legacies. It also chartered all such subordinate lodges as the Grand Lodge had at that time created, and conferred upon them equal powers.

By the act of 1819, all lodges that had been organized in the interim, were likewise incorporated, and those which might be subsequently organized also.

4. As a general rule the question as to the forfeiture, or dissolution of charters and acts of incorporation is one which concerns the public order, and the corporation is presumed to exist for all purposes of justice until the forfeiture is declared by the judgment of a competent court in some proceeding to which the State is a party.
5. New legislation cannot be engrafted upon different and distinct subject matter by way of amendment without mention being made of the object in the title; but any subject

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matter that is germane to the original text may be incorporated without being amenable to this objection, if it be stated in the title what particular law is to be thereby amended or reversed.

6. Every disposition by which the donee or the legatee is charged to preserve for or to return to a third person is null; though a disposition by which a third person is called to take the gift in case the donee does not take it is valid; and so is a disposition by which the usufruct is given to one and the naked property to another.
7. The intention of the testator must principally be endeavored to be ascertained without departing from the proper signification of the terms of the testament, and same must be understood in the sense in which it can have effect rather than that in which it can have none. The intention of the testator must prevail over the grammatical meaning of the words employed in the testament, if from other dispositions contained therein or other words employed, it is manifest that he had another thought than that the terms employed in a particular disposition would otherwise convey.
8. "Legacies to pious uses" are those which are destined to some work of piety, or object of charity, and are highly favored by the law, on account of their motives for sacred uses and their advantage to the public weal.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Young, J.

Ludeling & Stillman for Plaintiffs and Appellants.

Potts & Hudson; Stubbs & Russell and *Boatner & Boatner* for Defendants and Appellees.

The opinion of the Court was delivered by

WATKINS, J. The plaintiffs, alleging themselves to be universal legatees under the last will of Louisa L. McGuire, deceased, seek to have item third of said testament declared null and of no effect, on the following grounds, viz:

1st. Because the testatrix gave and bequeathed to the Western Star Lodge No. 24 of Free and Accepted Masons, of Monroe, La., her plantation on Bayou de Suard, requesting among other things, "that the net revenues of said property be used by said lodge for the support and education of the necessitous widows and orphans of deceased Masons," and that said clause or item of the testament was incorporated into it through undue influence and contrary to her real wishes.

2d. That same is null and void because it contains substitutions and *fidei commissi*, and invests said defendant lodge with a title stripped forever of use and *right of disposal*; creating a tenure which has no warrant in the laws of Louisiana; takes the plantation out of the reach of commerce; changes the nature of the title she transmits, and creates a perpetuity unauthorized by law and against the intent and policy of the State, and at variance with its settled jurisprudence thereof.

3d. The Western Star Lodge No. 24, F. and A. Masons, of Monroe,

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is not an incorporated institution or corporation organized under the laws of this State, and had not the capacity to take or receive a legacy or bequest of the testatrix, and same lapsed—if otherwise valid—for the want of a donee with capacity to receive; and if same was incorporated, it was and is only authorized “to manage its own affairs,” and “cannot fulfill any office of personal trust;” and that the item complained of constitutes said lodge a trustee for the necessitous widows of deceased Masons, and for whom said lodge is required to manage and control the plantation bequeathed, contrary to law, and the purposes for which said Lodge was organized.

They complain of the act of the testamentary executors in surrendering the property to the Lodge, and allege that they, in addition, surrendered lots 4, 5 and 6 of sec. 10, township 18, range 4, containing 128 acres, which is not a part of the McGuire plantation, and was not embraced in the clause or item three of the testament.

All of the members of the Western Star Lodge are enumerated in petition, and their prayer is “that the Western Star Lodge No. 24 of F. and A. Masons, of Monroe, and the several members thereof, as well as the testamentary executors and lessee, be cited; and they as universal legatees under said will, be declared the *owners* of said plantation and revenues, with legal interest, and that the executors render an account.

The defendants join in an exception of no cause of action, which was referred to the merits, and they thereafter file separate answers.

The answer on the part of the lodge is that it was organized and instituted on the authority of the Grand Lodge of the State, duly chartered by the legislature thereof, and whereby it was vested with full power, authority and capacity to receive, take and apply bequests and donations, for the uses and purposes intended by the institution of the Masonic order.

It admits the receipt of the plantation in controversy from the executors of the will of Mrs. McGuire, and the lots mentioned as separate therefrom, though insisting that same formed a part of the plantation and were anciently purchased for the purpose of timber use, and which is frequently overflowed and of little value otherwise.

It specially denies that the item of the testament complained of contains either a substitution or *fidei commissum*, and “avers that said donation was made to it (said Lodge) simply, directly and unconditionally, without any restraint as to its future disposition, and that it now *owns* and *holds* the same in fee simple and in its own right and in *absolute and unconditional ownership*,” and a prayer is made for the

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rejection of all of the plaintiffs' demand; and in the event of judgment against the Lodge that there be an allowance in its favor of the sum of \$2200, for the reimbursement of expenditures, betterments, taxes and repairs.

The executors, in substance, adopt the answer of the Lodge and insist upon their exception.

I.

The question first to be considered is whether in 1882, when the testatrix died, the Western Star Lodge No. 24, F. and A. M., was an incorporated institution, possessing the capacity to take and receive this bequest. It is argued that this question is vital; and if the defendant Lodge cannot show its incorporation and capacity to take and receive the bequest in question the controversy is at an end.

Private corporations must "be authorized by the Legislature, or established according to law." R. C. C. 432.

Corporations legally established "may possess an estate," and "are capable of receiving legacies and donations;" and "may enact statutes and regulations for their own government." R. C. C. 433.

The right of succession is inherent to the nature of corporations, and they transmit to their successions their rights and property. R. C. C. 434.

A corporation cannot fulfill another office of personal trust. R. C. C. 441.

A corporation legally established may be dissolved by an act of the Legislature, if they deem it necessary or convenient to the public interest. R. C. C. 447.

From the record it appears that on the 18th of March, 1816, the Legislature of the State incorporated the Grand Lodge of the State of Louisiana, upon the petition of certain members thereof, for the purposes of the promotion of the good of the craft, and the dissemination of charity and benevolence; and which declared "that the several persons hereinbefore named, and others who are or may become members of the said Grand Lodge, and their succession, shall be and *they are hereby deemed to be a body corporate and politic* in name and deed, by the style of the Grand Lodge of the State of Louisiana, and by the said name and style shall have perpetual succession * * * and shall have full power to make, alter, amend and change such by-laws as may be agreed on by the members of same."

It was further enacted that said Grand Lodge shall have full power "to take, hold and enjoy real and personal property * * * and to receive, take and apply any bequest or donation as may be made to and for the uses and purposes intended by the said institution."

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It further provided "that all the regular lodges *already* constituted, under the power and jurisdiction of the Grand Lodge, are hereby declared to be bodies corporate and politic in name and deed * * * with equal powers to those which are hereby given to the said Grand Lodge, so long as said Lodges remain under the power and jurisdiction of said Grand Lodge," etc.

The record further discloses that on the 11th of February, 1819, the legislature enacted an act supplemental to the act of 1816, the provisions of which are "that all the regular lodges *which have been* constituted by the Grand Lodge of the State of Louisiana *since* the passage of the act to which this is a supplement, as well as all the regular lodges which shall be hereafter constituted by the same, are hereby declared to be bodies corporate and politic * * with equal powers, to those which are given to the said Grand Lodge by the said act, etc."

The record also discloses that on the 20th of April, 1872, the act of March 18, 1816, was further amended and supplemented by the legislature by conferring upon the *Grand Lodge* of the State power to sell, mortgage or otherwise encumber any species of property; to borrow money upon mortgage of real estate, or pledge of personal property; to issue bonds, etc., "and that these powers shall attach to *all* the regular lodges which have heretofore been or shall hereafter be constituted by the said Grand Lodge, etc."

It is obvious that these statutes confer full and plenary power upon the Grand Lodge and upon all other lodges which have been constituted by the Grand Lodge *since* their enactment, to take and receive; to use and dispose of such property as is designated in the testamentary bequest under consideration.

But it is earnestly argued by plaintiffs' counsel that the laws of 1816 and 1819 were repealed by the provisions of art. 123 of the Constitution of 1845, which forbade the creation of corporations by the legislature, coupled with the provisions of art. 142 of the same instrument which contains the usual repealing clause.

A similar provision is contained in the Constitution of 1879; but we consider that same did not have the effect claimed for the quoted provision of the Constitution of 1845. It was not an express repeal, and cannot be fairly construed into a repeal by implication.

The object the framers of those two instruments evidently had in view was to remedy the existing evil, of permitting the legislature to create an unlimited number of private corporations to the great detriment of the public interest. It certainly was not their purpose to thereby annihilate all the private corporations in the State, and with-

out regard to the disastrous results such a sweeping repeal might produce.

This Court's predecessors have, in at least one well considered case, maintained a contrary view to the one that is pressed upon our attention by plaintiffs' counsel. We refer to the case of Polar Star Lodge No. 1 vs. Polar Star Lodge No. 1, 16 Ann. 53 *et seq.* In that case the Court said: "In 1816, the legislature, by a *general law*, incorporated the Grand Lodge of Louisiana, and all other lodges under its jurisdiction, so long as said lodges should remain under the power and jurisdiction of said Grand Lodge."

"In 1819, the power conferred by the legislature upon the Grand Lodge to *create masonic corporations* under its jurisdiction is in these words, viz: *Be it enacted, etc.,* That all the regular lodges, which *have been* constituted by the Grand Lodge of the State of Louisiana since the passage of the act to which this is a supplement (1816) as well as all the regular lodges which shall be *hereafter constituted* by the same, are hereby declared to be bodies corporate and politic, in name and deed * * with *equal powers* to those given to said Grand Lodge by said act, etc. * * * In February, 1855, the Grand Lodge granted a charter to the Polar Star Lodge No. 1. This Lodge, being the only masonic body of that name, continued to act under the jurisdiction of the Grand Lodge until 1868."

Again: "As a general rule, the question as to the forfeiture or dissolution of *charters and acts of incorporation* is one which concerns the public order, and *the corporation is presumed to exist for all purposes of justice* until the forfeiture is declared by *the judgment of the court* in some proceeding in which the State is a party. No provision has been made, which we recollect, for the surrender of *charters*, except those in 1812, in relation to banks. Whether the Grand Lodge has the power to declare the forfeiture of Masonic charters granted by itself, or to receive the surrender of the same, is not now necessary to determine; for it does not appear that it has accepted the surrender of the charter of 1855, nor declared the forfeiture of the same. It must, therefore, be assumed that it still exists."

The authority of that case is seriously questioned by plaintiffs' counsel; but, in our opinion, without avail. That suit was brought to annul a donation of real property. It was made a question therein whether the plaintiff was the same corporation as that formed in 1855, or one having its origin since the donation was made in 1858.

It is obvious that this question was a *vital* one in that case; and if

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the plaintiff could not trace back its origin to a time *anterior* to the date of the act of *donation*, that the controversy therein was ended. The Court in that case used this argument, and we think with propriety:

"It is further argued by the plaintiffs' counsel that the Western Star Lodge No. 24 is only an *auxiliary* corporation and possessed, as such, only such *corporate* powers as have been delegated to it by the Grand Lodge. This is an error. The acts of the Legislature, above quoted, not only declares that the Grand Lodge is a body corporate and politic, but it likewise declares that all the regular lodges which have been constituted by the Grand Lodge, as well as all the regular lodges which shall be hereafter constituted by the same, 'are hereby declared to be bodies politic and corporate,' etc. While some may be subordinate Masonic bodies, they are at the same time independent corporations—each one deriving its charter from the State by and through acts of the Legislature."

It is also insisted that Act No. 72 of 1872, amending act of 1816, is unconstitutional, because same does not express its "object or objects in its title." Art. 114 of Const. 1868; and strong reliance is placed on 5 Ann. 93 and 11 Ann. 723, as bearing out the contention. In our view that act was not essential to the existence or perpetuity of the Western Star Lodge No. 24.

While it is true that new legislation upon a *distinct and different subject matter* cannot be incorporated into an existing statute *by way of amendment*, without mention being made of its object in the title, it is equally true that any subject matter that is germane to the original text may be thus incorporated without being open to objection.

The title of Act No. 72 of 1872 is as follows, viz: "An act to amend the *second* section of an act entitled an act incorporating the Grand Lodge of the State of Louisiana, etc." The section thus amended confers upon the Grand Lodge the power to take, hold and enjoy real and personal property, and to receive, take and apply any bequest or donation; and its amendment consists solely in the *enlargement* of the powers thereby conferred, by authorizing it to sell, mortgage, encumber or pledge such property, and to borrow money on the faith of it, and to issue bonds or other obligations to pay money. This amendment was clearly indicated in the title of the act, and the act itself is not amenable to the objection urged against it.

We are therefore of the opinion that the Western Star Lodge No. 24, F. and A. M., was, at the date of the probate of Mrs. McGuire's will, a private corporation, chartered by the legislature and possessing at the time full power and capacity to take and receive the bequest therein contained. We are also of the opinion that no formal acceptance by the lodge of the *charter* conferred by a legislative enactment was at all necessary; the fact that the lodge acted under its charter from the Grand Lodge furnishes conclusive proof of such acceptance;

and the record furnishes abundant evidence that said lodge has so acted through a long series of years, and is so acting at this time. It has also accepted the bequest in express terms and is now in the enjoyment of the property.

II.

The plaintiffs are universal and residuary legatees or testamentary heirs, and are themselves recipients of the bounty of the decedent. They occupy the same position as creditors or simple heirs of the deceased and have no right to sue for the reduction of any donation made by the deceased, unless it be of such dispositions as are reprobated by law. R. C. C. 1504, 1519.

The clause or item of the testament complained of as null and void reads as follows, viz: "I give and bequeath to Western Star Lodge No. 24, F. and A. Masons of Monroe, my plantation on bayou de Suard in the parish of Ouachita, *desiring and requesting* that after the payment of the first year's revenues, after my death, to Annaretta Williams, as directed in item one, and the securing of a home for Eliza Vinson to the value of five hundred dollars *the net revenues of said property be used* by said lodge for the support and education of the necessitous widows and orphans of deceased Masons, within the jurisdiction of said lodge.

"I further give and bequeath to Western Star Lodge No. 24 the diamond pin given by the late Mr. Pargoud to my husband, R. F. McGuire, the lodge to make such disposition of it as they shall see proper."

The plaintiffs allege that this item is null and void, because it contains substitutions and *fidei commissa* and invests said lodge with a title that is stripped forever of use and the right of disposing of same, thereby creating a trust or tenure which has no warrant in law and takes the property bequeathed out of commerce.

On the other hand, the lodge contends that said item three contains neither a substitution nor a *fidei commissum*, but that it conveys to the lodge an absolute, unqualified and indefeasable title in fee simple to the property bequeathed for the purposes and objects of that institution.

The lodge announces that the objects of Masonry are charity to all mankind, and especially to members of the order and their families; assistance to the distressed and unfortunate and the poor and needful, and aid to the widows and orphans of deceased members of the craft, within their own jurisdiction and beyond it, in so far as they are able.

Let us see whether the item of the testament under consideration is amenable to the charge preferred against it.

The code provides that: "Substitutions and *fidei commissa* are and

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remain prohibited. Every disposition by which the donee, the heir or the legatee is charged to preserve for or to return a thing to a third person is null, even with regard to the donee, the instituted heir or the legatee." R. C. C. 1520.

The disposition by which a third person is called to take the gift in case the donee does not take it, is not a substitution. R. C. C. 1521.

The same is true of a disposition by which the usufruct is given to one, and the naked ownership to another. R. C. C. 1522.

To which class does this disposition belong, if either?

The Code has provided a rule for the interpretation of acts of last will. It declares that the "intention of the testator must principally be endeavored to be ascertained without departing from the proper signification of the terms of the testament." R. C. C. 1712.

"A disposition must be understood in the sense in which it can have effect rather than that in which it can have none." R. C. C. 1713.

In 8 Ann. 172, *The State of Louisiana vs. The Executors of John McDonogh* the Court said: "The intention of the testator must prevail over the grammatical meaning of the words which he has used; provided his intention is ascertained by dispositions contained, and words used in the will, and it is manifest that he had another object, and another thought than that which the terms used in a particular disposition would otherwise convey.

"When the sense of a particular disposition, resulting from the entire instrument has been ascertained, courts may go further in cases of testaments than in cases of contracts, in disregarding the grammatical meaning of the words used, so far indeed as to supply words omitted, which may be done whenever the obvious meaning and the other parts of the will restore these words naturally."

Applying these simple rules to the interpretation of this disposition in question, and what is the result?

Can we ascertain the intention of the testatrix without departing from the terms of the will?

Can such a construction be adopted and give this disposition effect? If the true intention of the testatrix prevails over the grammatical signification of the words used in the will, is the idea of it containing a trust, a substitution, or *fidei commissum*, forfeited or overcome?

Does it show that Western Star Lodge No. 24, F. and A. M., "is charged to preserve for or to return the thing—the plantation bequeathed—to a third person?" If so, for what third person is it to be so preserved, or to what person is it to be returned? To whom did this testament pass the title at the testatrix's death? The words employed

are: "I give and bequeath to Western Star Lodge No. 24, F. and A. Masons, of Monroe, Louisiana, my plantation on bayou de Suard in the parish of Ouachita, desiring and requesting that * * * the net revenues of said property be used by said lodge for the support and education of necessitous widows and orphans of deceased Masons, etc."

Is there any difficulty in giving effect to this disposition?

It most unequivocally and undeniably gives and bequeaths the plantation to the Lodge. It does not direct or require it to *preserve* this plantation for any one named or designated. It does not direct or require it to *return* said plantation to any one named or designated. The testatrix expresses a desire, and accompanies same with the request of the donee that the net revenues of the plantation shall be used and employed in dispensing certain charities enumerated. This request is made of the Western Star Lodge as a charitable institution.

This request was in the direction of the objects and purposes of the order. The gift is made to the *same person* of whom the request is made. There is no *third person* involved in the matter.

In our opinion the will creates neither a substitution nor a *fidei commissum*.

It does not create a prohibited *trust*, or remove the property from the theatre of commerce.

"This legacy clearly belongs to a class known to the civil law from the foundation of Christianity by the name of legacies to *pious uses*. They are an element in the polity of municipal administrations in all countries, which have preserved the features and jurisprudence of Roman civilization." 8 Ann. 246, McDonogh's will.

"Legacies to pious uses are those which are destined to some work of piety, or object of charity, and have their motive independent of the consideration which the *merit* of the legatees might procure to them. In this motive consists the distinction between this and ordinary legacies." Domat, lib. ix, vol. iv, sec. 6, par. 2.

Legacies to pious uses are highly favored by the law, on account of their motives for sacred usages and their advantage to the public weal; and the great consideration which the law attaches to these legacies controls tribunals in their interpretation of them, and has secured for their support a doctrine of approximation which is coeval with their existence. 8 Ann. 246.

It is far better that the good lady, who honestly desired to make a munificent donation to the defendant for "pious uses," should have that intention carried into effect, and that the wants of widows and orphans be supplied, than that they should be forced to

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rely upon the meagre charities of the world, and be a tax upon the people of the parish of Ouachita.

We find it unnecessary to digest and collate the various authorities cited in the briefs of counsel, and which have received due consideration.

Our conclusion is that item three of Mrs. McGuire's will was a legacy to Western Star Lodge No. 24, F. and A. Masons, of Monroe, in *full ownership*, with a destination thereof to charitable and pious uses; and that the same does not create a trust, contain a substitution, or *fidei commissum*, or remove the property bequeathed from the arena of commerce. We are of the opinion that the several small lots alleged to be separate, and detached from the plantation bequeathed, were considered by the ancient owner, as well as the testatrix, as a part of same, and that same were intended to form a reserve for timber uses as an accessory of the plantation; and that such a fact may be proved by parol and by general reputation.

Judgment affirmed.

No. 1143.

POLICE JURY, PARISH OF OUACHITA, VS. MAYOR AND CITY COUNCIL OF MONROE, ET AL.

Police juries, like all other corporations created under the laws of Louisiana, are artificial beings, who can act only in the mode prescribed by the law creating them.

No officer of a police jury can legally bind or stand in judgment for the corporation without special authorization.

Parol testimony is inadmissible in proof of such authorization, as police juries can act only by ordinances or resolutions.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

Potts & Hudson for Plaintiff and Appellee.

Talbot Stillman for Defendants and Appellants.

The opinion of the Court was delivered by

POCHÉ, J. This suit is brought by the president, on behalf of the police jury, for the purpose of enjoining the city council of Monroe, and other parties designated as "The Business Men's Association," from usurping the exclusive power and privilege of the police jury of establishing and regulating public ferries within the parish, and for damages occasioned by the defendants by means of a free public ferry which they have established on the Ouachita river opposite Monroe.

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After filing a peremptory exception of no cause of action, which was overruled, the defendants set up a general denial, followed by several special defences.

The judgment appealed from was in favor of the city council of Monroe, and against the other defendants, perpetuating the injunction and condemning them to damages in the sum of two hundred and fifty dollars.

On appeal the defendants composing the "Business Men's Association" assign as error that the president of the police jury is without right or warrant in law to stand in judgment for the parish of Ouachita. His counsel replies that the defence comes too late and that it should have been pleaded *in limine*.

The objection is not levelled at the capacity of the president, but at the latter's authority to stand in judgment for the police jury.

The general denial put at issue the allegation in plaintiff's petition that he was specially authorized to institute this suit in the name and on behalf of the police jury, hence there was no cause for an exception *in limine*, but if on trial the alleged authority was not proved it is clear on reason as well as authority that the omission can be invoked as a defence by an assignment of errors on appeal. *Flower vs. O'Connor*, 7 La. 196; *Notrebe vs. McKinney*, 6 Rob. 13; *Hyde et al. vs. Brashear*, 19 La. 402; *Brunette vs. New Orleans*, 14 Ann. 120.

Police juries, like all other corporations created under our laws, are artificial beings or persons, who can act only in the mode prescribed by the law creating them, or in the manner specified in their organic law or character. *Bright vs. Metairie Cemetery Association*, 33 Ann. 58, and authorities therein cited.

We know of no law, and we have been referred to none, which vests the general power in the president of the police jury to act for, to bind or represent the body in any contract or judicial proceedings without special authority thereto from the corporation.

But the contrary doctrine flows from the very nature of the powers and duties conferred on and required of such corporations by the laws creating them.

No officer of such corporations can, without special authority, legally represent the body before the courts or stand in judgment for the same. *Helluin vs. Maurin*, 8 La. 111; *Capmartin vs. Police Jury*, 19 Ann. 448.

A suit instituted by the president, in behalf of the police jury, without special authority thereto, could create no legal effects binding

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on the corporation, and the judgment rendered therein could not be set as *res judicata* against the corporation.

It follows, therefore, that in the instant case, in the absence of proof of legal authority in the president to stand in judgment for the police jury, the judgment rendered below against these defendants would be no bar to a future action by the parish against the same parties and for the same cause of action.

This conclusion seems to be conceded by plaintiff's counsel, for in his petition he distinctly alleges that the president of the police jury "is specially authorized to institute this suit;" but the record discloses that he failed to make even an attempt to prove the authorization.

In his oral argument he referred as proof of such authorization, to the affidavit of plaintiff in support of the injunction prayed for, but he could not have been serious in such a contention.

Police juries act only by ordinances or resolutions, and no parol testimony would be admissible in proof of either.

These considerations lead to a judgment of non-suit against plaintiff.

It is, therefore, ordered, that the judgment appealed from be annulled, avoided and reversed, and it is now ordered that plaintiff's demand be rejected and the action dismissed as in case of non-suit at his costs in both courts.

No. 1145.

THE STATE OF LOUISIANA VS. TOBE OLIVER.

The judgment appealed from sustained a motion in arrest on the ground of defect in the verdict, and remanded the prisoner to custody to await a new trial. The accused, contending that the legal effect of sustaining the motion in arrest, on the ground stated, was to terminate the case and to entitle him to a discharge, and thus to make it a final judgment, prosecutes this appeal to correct the alleged error in remanding him to custody.

He is entitled to have the question passed on.

There was no error in the action of the judge *a quo*. The defect in the verdict was that, being special, it found accused guilty of no crime denounced by law, and it thus falls under the authority of Foster's case, 36 Ann. 857, and Burdon's case, 38 Ann., in both of which the verdict was set aside and prisoner remanded for new trial.

The case is different from those of Day, 37 Ann. 785, and Murdock, 35 Ann. 729, where the verdicts were not defective in form or substance, but were only set aside because not warranted by the indictment.

Reasons given for the distinction.

A PPEAL from the Second District Court, Parish of Webster.
Drew, J.

State vs. Oliver.

M. J. Cunningham, Attorney General, for the State, Appellee.

Watkins & Watkins for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. Defendant was tried under an indictment charging that he did "wilfully, feloniously and of malice aforethought shoot Frank Key, with intent him, then and there to kill and murder," etc.

The indictment is, in every respect, properly framed, as a charge of the offense denounced by Sec. 791 of the Revised Statutes.

After due trial, the jury rendered the following verdict: "We the jury find the prisoner guilty of shooting with *attempt* to kill and ask for him the mercy of the court."

Defendant moved for a new trial on several grounds, and also filed a motion in arrest of judgment on the ground that "the verdict is not responsive to the indictment, and the variance between the two is fatal and the accused should be finally discharged as in effect acquitted."

The two motions were tried together, and judgment was rendered as follows: "By reason of the law and the failure of the jury to find a legal verdict, it is ordered, adjudged and decreed that judgment be arrested, the verdict of the jury set aside, and the defendant remanded to the custody of the sheriff for a new trial."

From this judgment the defendant appeals, claiming that the effect of the judgment sustaining the motion in arrest of judgment was to terminate the prosecution and to require the discharge of the accused; and the qualification thereof remanding him to custody for a new trial was erroneous and illegal.

The attorney for the State moves to dismiss the appeal on the ground that, in criminal cases, appeals only lie from final judgments, and that this is not such a judgment. He cites Rev. Stat. sec. 1001; 37 Ann. 62; 33 Ann. 1228; 15 Ann. 347; 12 Ann. 390; 9 Ann. 69, 157; 8 Rob. 583.

Undoubtedly it is true that criminal appeals only lie from final judgments; but the contention of defendant is that this judgment is, in its nature and legal effect, final; and that the judge has committed error in qualifying it and thereby denying its effect as a final judgment.

Under the peculiar circumstances we think the appeal should be maintained and the question passed upon; since, if the nature of the judgment rendered be such as to terminate the prosecution and require the discharge of the prisoner, it is intolerable that he should be held in custody and subjected to a new trial and judgment therein, before such an error could be corrected.

On the merits, however, we think the judge did not err in his ruling.

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The defect of the verdict is that it finds the prisoner guilty of no crime denounced by law. It falls directly under the authority of *State vs. Foster*, 36 Ann. 857, and *State vs. Burdon*, 38 Ann.—not yet reported—in both of which cases, after setting aside the verdict, we remanded them for new trial.

This course is in strict accord with the authorities. Thus Mr. Bishop says: "There ought never to be a defective verdict. If the jury bring in a defective verdict, it is in the power equally of the prisoner and of the prosecuting attorney to have it set right; and suppose the prisoner chooses not to interfere, and suffers a defective verdict to be entered, as his interest would always prompt him to do, in preference to a verdict of guilty in due form, he, by thus failing to interpose, waives his objection to being put a second time in jeopardy for the same offense. In all such cases, therefore, the verdict is simply set aside as a nullity, and a new trial is ordered." 1 Bishop Cr. Proc. § 1016, and numerous cases there cited.

The cases of *Day*, 37 Ann. 785, *Murdock*, 35 Ann. 729, and *Pratt*, 10 Ann. 191, were of a different character. In those cases the verdicts were not defective in form or substance. They were sufficient verdicts for crimes denounced by law; and were only set aside because not warranted by the indictments. The defendants could not have objected to the recordation of such verdicts and the implied waiver of second jeopardy did not arise. Their only recourse was by motion in arrest after verdict.

We think the judge *a quo* acted in full accordance with law.

Judgment affirmed.

No. 1144.

I. N. GLOVER VS. J. H. M. TAYLOR.

1. A suspensive appeal bond reciting in *substance* that it is given as surety that appellant shall prosecute his appeal, and pay such judgment as may be rendered against him is good.
2. A devolutive appeal bond filed in the clerk's office before the expiration of the return day fixed in the order of appeal, is in time.
3. An agreement entered into between two rival candidates for a public office, whereby each one of them undertakes and binds himself to pay the other, in case of his own election, one-half of the net profits of the office, for the term, is in violation of good order and public policy, subversive of the best interests of society, has a tendency to destroy the safe-guards of the ballot-box and cannot be enforced by the courts.

A PPEAL from the Third District Court, Parish of Claiborne.
Young, J.

Glover vs. Taylor.

Allen Barksdale, John A. Richardson and John R. Phipps for Plaintiff and Appellee.

Egan & Pierson and J. W. Holbert for Defendant and Appellant:

The opinion of the Court was delivered by

WATKINS, J. Plaintiff moves to dismiss this appeal on the following grounds, viz:

1st. That the suspensive appeal bond is not conditioned that appellant *shall* prosecute his appeal; nor that he shall pay and satisfy "whatever judgment may be rendered against him if he be cast in his appeal; nor that he shall pay the cost of both the Supreme Court and inferior court if he be cast in his appeal."

2d. That there is no order of appeal to support the bond last filed on June 3, 1886.

The judge *a quo* in his order, granted in open court appeals *suspensive and devolutive* returnable to this Court according to law on the return day, and suspensive appeal bond was fixed according to law and the devolutive appeal bond at \$175.

Appellant furnished a suspensive appeal bond in the sum of \$1,300, but the technical sufficiency of same is complained of and may be open to objection—but with reference to which we find it unnecessary to express an opinion, inasmuch as the appellant filed a devolutive appeal bond before the return day had expired. This bond is not objected to as to form. The quotation from the order of appeal above given was ample authority for it.

The fact that the transcript had been previously prepared and certificate signed makes no difference.

It was submitted to and filed by the clerk in time, as same was done prior to the return day fixed in the order of appeal, granting both a *devolutive* and suspensive appeal. 35 Ann. 937, *Thomas vs. Bienvenu*.

Motion refused.

ON THE MERITS.

Plaintiff and appellee has filed in this Court an answer to the appeal and prays that the judgment of the lower court should be increased to \$1,458.33.

This suit arises under the following agreement, viz:

STATE OF LOUISIANA, PARISH OF CLAIBORNE, }
April 23, 1884. }

Articles of agreement made and entered into this day by and between I. N. Glover and J. H. M. Taylor, is as follows, to-wit: That in

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case I. N. Glover is elected sheriff of the above parish and State, or J. H. M. Taylor, that we do both agree that the sheriff elect shall divide equally between each other the profits of the sheriff's office during the four years; and also agree to pay John M. Brown the sum of two hundred dollars per year for the above term mentioned, and the unsuccessful candidate shall be deputy sheriff.

(Signed)

J. H. M. TAYLOR,
I. N. GLOVER.

Plaintiff further alleges that J. H. M. Taylor was duly elected sheriff of the said parish at said election; that the said office pays \$4,200 per year, and claims judgment against defendant for \$2,450, one-half, for fourteen months.

Defendant answered, admitting his signature to the original agreement, but denying the existence of the contract as set up by plaintiff in his petition, and urged various special defenses against the legality of the agreement.

The case was tried by a jury, verdict and judgment for plaintiff, and defendant appeals.

Before issue was joined, either by default or answer, defendant filed the following peremptory exceptions to plaintiff's petition and cause of action:

IN DISTRICT COURT—JULY TERM, 1885.

No. 637.]

Now comes defendant in this suit for the sole purpose of excepting to plaintiff's petition and cause of action on the following grounds, to wit:

1st. Petition discloses no cause of action, in this: that the contract or agreement upon which plaintiff bases his cause of action, is prohibited by law, *contra bonos mores*, against good order and public policy, null and void, and cannot be enforced by law.

2d. Defendant specially pleads that if the court should hold that the first ground set up in this exception not good, and should hold that said contract can be enforced by law, then defendant pleads prematurity of plaintiff's action.

3d. If the court overrules the first grounds, then defendant pleads that plaintiff cannot sue for a specific amount, involving a settlement to ascertain said amount, before he alleges and proves a settlement, and that said amount is due after said final settlement.

Wherefore, defendant begs that this exception be sustained, and plaintiff's suit be dismissed with all costs.

J. W. HOLBERT,
Attorney.

After this exception was filed, and before the trial of same, defendant filed his answer and then called up his exception for trial. The plaintiff, here, objected to the trial of the exception and urged that defendant had waived the same by subsequently filing his answer. The court heard the peremptory exceptions and overruled the same.

The first exception propounds the serious question in this case. Has plaintiff an actionable interest on such a contract?

This is not an action for services performed, in pursuance of his employment as deputy sheriff, and to which he had been appointed according to law, by reason of his peculiar fitness and competency for the discharge of the responsible duties thereof. C. P. 764.

The agreement was entered into *before* the result of the election was known, and at a time when neither was an occupant of the office, nor had any title to it.

In Davis vs. Holbrook, 1 Ann. 176, plaintiff brought suit on an agreement couched in these words, viz:

"If the vote of Louisiana is cast for Henry Clay, the endorsed certificate of deposit for \$1,000 00, payable to our joint order endorsed thereon, is to be delivered to E. A. Davis, one of the undersigned. Should the vote of Louisiana be cast for James K. Polk, then the certificate is to be delivered to A. H. Hayes, whose name is also hereunto subscribed.

"(Signed:)

"E. A. DAVIS,

"A. H. HAYES."

In that case the Court say:

"The safety and success of our institutions depend upon the purity of the elective franchise, and the substitution of a desire for gain, to the exercise of that free and unbiased judgment which an elector is bound to exercise in the choice of those to whom political power is to be entrusted, is so fraught with disastrous consequences that they cannot be considered without alarm.

"The addition of a spirit of rapacity to the already too ardent excitement growing out of the struggles for ascendancy between parties, tends to produce consequences which must result in putting an end to this great experiment of self-government which our republic offers to the world. * * *

"Our elections, if such proceedings are tolerated, would cease to be the choice of the people, of those who are to administer their affairs, but become a disreputable game of desperate chance, and profligacy."

In 12 Ann. 154, Fox vs. City, the Court held that "no action can be maintained upon a contract made in violation of law."

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Our Code declares that "an obligation without a cause, or with a false or unlawful cause, can have no effect." R. C. C. 1893.

From the letter of the instrument sued on the only consideration on which it rests is the illegal condition on which he was to *obtain* one-half of "the profits of the sheriff's office during four years"—an office to which he was not elected by the votes of the people.

Offices are to be granted absolutely *without any condition*. It is not in the power of the grantor to lessen the emoluments which the law has affixed to the discharge of official duties; *it matters not to what use the share of emoluments thus carved out is applied*. The public will be all ill-served if the circle within which an officer is to be selected, is *narrowed* by a reduction of the legal emoluments. If these are withdrawn from the incumbent, he may be placed under the temptation of compensating himself by speculation, extortion and fraud." 4 O. S. 49, Faurie vs. Morin, Syndic.

It is the duty of the sheriff, under the law, to make the best appointment in his power, according to his judgment, at the time of making the appointment; and it is against public policy and adverse to the efficient performance of the duties of his office, that he has entered into a binding agreement *beforehand* to appoint a *certain* person without any regard to his qualifications, and to deprive himself of the power of making the appointment of others if needed, and of removing the appointee if, in his judgment, his removal became necessary.

This contract is for four years—the entire term of defendant's office. Not only does it provide for the *equal* division of the profits of the sheriff's office *during the four years*, but it contains a further specific agreement "to pay John M. Brown the sum of *two hundred dollars per year* for the above time mentioned," etc.

Defendant, in an amended answer, tendered and refused, directly charges that the plaintiff procured, *unduly and illegally* and by means of a valuable consideration, the support of John M. Brown, and his relations and friends, and his and their votes, at the polls and at the election whereat the plaintiff was a candidate, and whereby the result of said election was unduly influenced against defendant, and that said consideration entered into and formed a part of the agreement sued on, and was evidenced in writing.

While this averment furnishes no proof, even the charge, under the circumstances stated, gives color to the complaint.

In 101 U. S. 112, McGuire vs. Corwin, the Court said:

"While recognizing the validity of an honest claim for services honestly rendered, but which are blinded and confused with those which

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are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together.

"When the taint exists, it affects fatally, in all its parts, the entire body of the contract. * * * When there is turpitude the law helps neither party."

Public offices cannot be the object of a contract of sale or a cession.

Our conclusion is that the agreement sought to be enforced is one entered into in open violation of good order and public policy, and the enforcement of which would lead to consequences subversive of the best interests of society, and have a direct tendency to destroy the safeguards of the ballot-box.

The defendant's first exception was well taken, and should have been maintained.

It is therefore ordered, adjudged and decreed that the verdict of the jury and the judgment appealed from be avoided, annulled and reversed, and that the defendant's first peremptory exception be sustained, and plaintiff's demands be rejected and that he be taxed with the costs of both courts.

No. 1153.

JANIE S. RICHARDSON ET AL. VS. ROBERT RICHARDSON.

In case of conflict between provisions of the Civil Code and those of the Code of Practice on questions of practice the provisions of the latter Code must prevail.

Under art 958, Code of Practice, the office or function of curator *ad litem* has no longer any existence in law.

When laws *in pari materia* are to be interpreted, that construction is to be preferred which will give effect to all their provisions.

Hence art. 958, C. P., in abolishing the function of *curator ad litem*, does not abrogate any of the rights vested in emancipated minors by sec. 2, chapter 2 of the Civil Code on the subject of emancipation.

Their right to appear in courts in order to enforce such rights, without assistance, is therefore maintained.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

Potts & Hudson for Plaintiffs and Appellees.

T. O. Benton for Defendant.

C. J. & J. S. Boatner for Intervenor and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. The cause of action and the relief sought in this suit are

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identical with the matters at issue in the case of Robert G. Richardson et al vs. Robert Richardson just decided, with the exception of a question of practice which distinguishes the one from the other to that extent only.

In this case the plaintiffs, minors, above the age of fifteen and unmarried, have been emancipated by the notarial declaration of the defendant, their father, under the provisions of art. 366 of the Civil Code, and thus are joined and assisted in their suit by a curator *ad litem*, specially appointed and qualified for the purposes of this controversy.

Intervenor excepts to their capacity on the ground that the office or function of curator *ad litem* has been abolished by art. 958 of the Code of Practice.

Plaintiffs resist the right of an intervenor to urge exceptions or other matters of pleading which are personal to the defendant.

We are rather inclined to adopt these views, and we entertain very serious doubts of the right of intervenor herein to set up this special defense, but premitting a discussion of that question we have concluded to consider the plea.

Article 375 of the Civil Code, which is incorporated in chapter the second under the title of minors and forms part of the second section, which treats of the "emancipation conferring the power of administration," reads as follows :

"The minor who is emancipated otherwise than by marriage cannot appear in courts of justice without the assistance of a curator *ad litem*, who is to be appointed for him specially by the judge for that purpose."

Article 958 of the Code of Practice provides as follows :

"There shall hereafter be no curator *ad bona* or curator *ad litem* appointed in any case; the persons and estates of minors shall in all cases be placed under the power of tutors and under tutors; and the powers, duties and responsibilities of tutors and under tutors, as well as their liability to be removed from office, shall continue until the minor or minors attain the age of majority, or are otherwise emancipated."

Intervenor argues, and it must be conceded, that in questions of practice, in case of conflict between the Civil Code and the Code of Practice, the provisions of the latter Code must prevail.

It follows that the office of curator *ad litem* has ceased to exist under our laws.

But from those premises, intervenor's counsel conclude that minors

emancipated otherwise than by marriage are stripped of the capacity to appear at all in their own rights in any judicial proceedings.

We cannot sanction their conclusion.

As a guide to courts in interpreting laws of a doubtful meaning, the Civil Code, art. 17, contains the following provision :

"Laws *in pari materia*, or upon the same subject matter, must be construed together with a reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another."

And from that proposition, jurisprudence has extracted the following corollary which embodies a judicious rule of construction.

"When laws *in pari materia* are to be interpreted, that construction is to be preferred which will give effect to all their provisions." Succession of Hebert, 5 Ann. 122; Desban vs. Pickett, 16 Ann. 350; Staes vs. Gastinel, 21 Ann. 407.

The evident and clear intention of the law-maker in enacting the various articles from 366 to 378 of the Civil Code, forming sec. 2 of chapter 2, treating of the emancipation conferring the power of administration, was to relieve that class of persons of certain disabilities which otherwise attach to minors. Hence art. 370 reads :

"The minor who is emancipated has the full administration of his estate, and may pass all acts which are confined to such administration, grant leases, receive his revenues and moneys which may be due to him and give receipts for the same."

To be effective, the right to administer an estate, to receive revenues, etc., must include the right to judicially demand either the estate which may be withheld or the revenues which are due and payment of which is refused or neglected. Of what avail would be the right to receive revenues, if the same could be arbitrarily retained by the debtor ?

The question is practically answered by art. 375, which confers the right to the minor to appear in courts; but the article imposes a condition in certain cases, and that is the assistance of a curator *ad litem*.

Now, in abolishing that function by the act which is now embodied in art. 958, C. P., did the law maker intend to strip that class of emancipated minors of the right of appearing in courts altogether ?

To have done so would carry with it the denial of almost all the rights conferred to them by the provisions of the Civil Code above referred to, and thus the law giver would leave them at the mercy of those who would choose to invade their rights, as no other means are provided for to empower them to appear in courts.

Such a construction is repulsed by the rules of interpretation which we have hereinabove quoted.

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But in terms, the art. 958 limits the disability of minors to the time of their emancipation.

Intervenor's counsel are in error in contending that the emancipation referred to is that provided for in the Code for minors who are over the age of eighteen years and are by that emancipation relieved of all their disabilities.

In our opinion, the article refers to all minors who are thus or otherwise emancipated.

Hence we conclude that the class of emancipated minors with which we are now dealing, have the legal power to appear in courts in their own rights for the purpose of enforcing the rights which are vested in them by art. 375 of the Civil Code and other articles on the same subject matter.

We, therefore, hold that the plaintiffs in this case have the capacity to stand in judgment in this suit, and that their pleadings are not vitiated by the unnecessary joinder of a curator *ad litem*.

All other questions which are presented in the case are fully covered by our opinion in the case of R. G. Richardson et al vs. R. Richardson, No. 1152, hereinabove referred to, and hence these plaintiffs are entitled to the same relief which was granted in the other case.

Judgment affirmed.

No. 1148.

THE STATE OF LOUISIANA VS. WHITE MAJOR.

The complaint of an accused that he was refused further time to prepare a motion for new trial five days after conviction, cannot be entertained.

Such matters are within and must be left to the sound discretion of the trial judge.

It is not only the right but the duty of the trial judge to order the correction of the minutes of his court so as to make them conform with the true facts as they occurred.

A PPEAL from the Twentieth District Court, Parish of Lafourche.
Beattie, J.

M. J. Cunningham, Attorney General, and E. A. O'Sullivan, District Attorney, for the State, Appellee:

Every court has the power to correct its minutes so as to conform to the facts, and such corrections can be made after appeal taken. 31 Ann. 388, 407, 557; 32 Ann. 1229; 33 Ann. 135; 34 Ann. 370; 35 Ann. 852.

A party who is brought up for sentence five days after conviction, is not entitled to further delay to prepare and file a motion for new trial.

Applications for such delays are addressed to the sound discretion of the trial judge, and his action thereon is not to be reviewed unless manifestly unjust. If any time intervened between verdict and sentence, appellant must show special reason why more was needed.

J. S. Billiu for Defendant and Appellant.

The opinion of the Court was delivered by POCHÉ, J. This appeal is from a conviction of breaking and entering in the night time a dwelling house with intent to kill, and from a sentence of imprisonment at hard labor for life; it presents two complaints by bills of exceptions.

1. The defendant complains that he was refused a reasonable extension of time to prepare and present a motion for a new trial.

The facts are that he was convicted on the 12th of April, on which day the judge announced that he would pass sentence on the 17th of that month.

On that day the defendant moved for further time for his motion, and his request was, in our opinion, very properly refused.

There is no merit in the complaint; and members of the bar may rest assured that all attempts to induce this Court to interfere with trial judges in the exercise of their legal discretion, can prove of no avail to their clients.

2. The defendant next complains of an order of the judge on motion of the district attorney, directing the clerk to amend the minutes of the court after the order of appeal had been granted.

In the light of our jurisprudence, the mere statement of the complaint is its best answer.

The minutes of his court are absolutely under the control of the judge, and corrections of the same, so as to make them conform with the facts as they occurred, is not only permissible but it is imperative when the attention of the court is called thereto. *State vs. Mason*, 32 Ann. 1018; *State vs. Teissier*, 32 Ann. 1227; *State vs. Cox*, 33 Ann. 1056.

The trivial character of the grounds supporting this appeal justifies the conclusion that the accused has had a remarkably fair and impartial trial.

Judgment affirmed.

No. 1158.

GODSHAW & PLANT VS. THE JUDGES OF THE SECOND CIRCUIT
COURT OF APPEALS.

In an action by a judgment creditor to have the purchase of property declared simulated and to be in reality for account of the debtor, the value of the property, and not the amount of the judgment, is the matter in dispute. 27 Ann 186.

APPPLICATION for Certiorari and Mandamus.

Godshaw & Plant vs. Judges.

Millsaps & Sholars for the Relators.

The opinion of the Court was delivered by

TODD, J. The relators, as judgment creditors of Joshua Lemle for \$600, brought suit to have declared simulated, null and void, a sheriff's sale of a stock of goods belonging to their debtor, and also a subsequent conveyance of said property by Winchester Hall, the adjudicatee at said sheriff's sale, to one Julius Lemle. From an adverse decision of the district court in said case, they appealed to the Second Circuit Court of Appeals, holding sessions in city of Monroe, parish of Ouachita, and by this court the appeal was dismissed, the judges thereof holding that the court was without jurisdiction to entertain the appeal *ratione materiae*.

The plaintiffs in said suit then applied to this Court for a writ of certiorari, through which the record of proceedings in the case have been brought before us, and also for a writ of mandamus directed against the judges of said court to compel them to take jurisdiction of said appeal.

The judges of said court, in answer to the preliminary rule, state substantially that they have declined jurisdiction of the appeal because the real issue involved in the case is the title to property estimated to be worth thirty thousand dollars, this being the alleged value of the stock of goods in possession of Julius Lemle, one of the defendants in said case, the sale of which to him is sought to be declared a simulation.

The question presented is simply whether the jurisdiction is to be determined by the amount of the pecuniary demand or the value of the property, the title to which is assailed. This has been the subject of several adjudications of late, and can scarcely be considered a matter for further discussion. *State ex rel. Bloss vs. Judges Court of Appeals*, 33 Ann. 1351; *John Chaffe & Sons vs. D. D. DeMoss and wife*, 37 Ann. 186. This last case cited is a parallel case with the present one. There a judgment creditor of the husband, for less than \$2000, sought to have declared the purchase of a plantation in the name of the wife a simulation and as really made for the husband. It was held that the case was properly appealable to the Supreme Court, because the property was worth \$6000.

But the relator urges that, inasmuch as he has prayed that the title to the property be declared null only so far as it affects his claim, this limitation or restriction in his demand invests the court with jurisdiction.

There is no force in this contention. The sale was of one stock of

 Heirs of Barrow vs. Barrow.

goods. The title under this sale is attacked. The matter of title is clearly indivisible; it cannot be good as to a part and bad as to a part. It is charged that the pretended purchaser at such sale was not the real purchaser, but that he was a person interposed—interposed for his debtor, the real purchaser. The sale was a sale in block. How could a person be interposed for another as to an undefined part of said sale and not interposed—not acting for another but for himself, as to residue? Such an idea of course is an absurdity.

The court of appeals had no jurisdiction over this appeal, and it was properly dismissed by that court.

It is therefore ordered, adjudged and decreed that the alternative writ of mandamus be set aside, and the writ now discharged at the costs of plaintiff and relator.

 No. 1149.

HEIRS OF JOSEPHUS S. BARROW VS. A. W. BARROW.

The will of the decedent was probated after due notice to the major heirs and to the legal representatives of the minor heirs; the executor was duly qualified and fully administered the estate; he filed his final account, assigning to the several heirs their special legacies, and fixing the distributive share of the residue falling to each heir, and prayed for its homologation, service of the petition having been accepted by the major heirs and the legal representatives of the minors; while said account was pending, said heirs and representatives received and receipted for their said legacies and shares, and granted full acquittance to the executor; and thereupon judgment was rendered homologating the account and granting final discharge to the executor.

After such proceedings, the heirs cannot be heard eight years afterwards to attack the validity of the will and the settlement of the executor. Such an action will not be sustained upon a bare allegation of error and fraud without the slightest suggestion of the nature and ground of such charge.

The plea of estoppel to such a suit was properly sustained as to all the plaintiffs except John W. Barrow, who was a minor unrepresented at the time, and was no party to the proceedings or settlement.

As to him, however, the prescription of five years from his majority applies and his action is barred.

A PPEAL from the Third District Court, Parish of Claiborne.
 Young, J.

James Dormon, McClendon & Seals and J. W. Holbert for Plaintiffs and Appellants:

1. Heirs who sue for the nullity of a testament and the reduction of an excessive donation, are not required to make a tender of what they had received before bringing their suit. 33 Ann. 749; 36 Ann. 236; 33 Ann. 773; 34 Ann. 1017; Suc. E. Commagere, No. 9532.
2. A judgment attacked cannot be pleaded as *res judicata* and estoppel against the action of nullity. 32 Ann. 13; 29 Ann. 599; 32 Ann. 1006; 34 Ann. 808; 15 Ann. 209; 33 Ann. 719 and 1198; C. P. 928-43.

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3. A judgment probating and ordering a will executed, is not binding on the heirs present or duly cited. 18 Ann. 444; 10 Ann. 78; 6 Ann. 104; 2 Ann. 724; 13 Ann. 575; 15 Ann. 209.
4. Minors can never be estopped. 16 Ann. 248; 16 Ann. 92; 13 Ann. 508; 1 R. 10.
5. A minor can only be represented in judicial proceedings by a tutor acting for and in the name of the minor. C. P. 108-9; 6 L. 377; 11 R. 693.
6. An executor cannot represent the minor heirs in the settlement of the estate he administers. C. P. 117; 13 Ann. 97; 10 Ann. 224; 21 Ann. 712.
7. Personal citation is necessary to render a judgment homologating a final account binding on the heirs. 15 Ann. 676; 16 Ann. 238; 11 Ann. 412; 6 L. 222; 11 R. 109; 6 L. 354; 7 R. 46; 10 Ann. 674; 8 L. 321; 5 R. 453.
8. A citation must be addressed to the defendant. The defendant only or his attorney of record can waive citation. C. P. 173, 177 and 178.
9. The husband cannot waive citation on his wife when she is principal defendant, and the husband not a party to the suit. 19 Ann. 208 and 360; C. P. 178 and 192; C. C. 1317.
10. A waiver of citation must be clearly shown; a court cannot presume anything with respect to a party being cited. 19 Ann. 212; H. p. 245-4; L. p. 113-4.
11. In an exception of no cause of action, the allegations of the petition are taken as true, no evidence can be received. 30 Ann. 1148 and 14 Ann. 137 and 825.
12. Substitutions and *fidei commissa* are prohibited. C. C. 1519 and 1520.
13. An heir has a right of action against his co-heir for collation and of reduction. C. C. 1242 to 1250, and 1502 to 1518.
14. A disposition of property reprobated by law cannot be ratified. 29 Ann. 120; 15 Ann. 700; 3 Ann. 328; 21 Ann. 600; 15 Ann. 154.
15. A party cannot be held to ratify a settlement when they were ignorant of the facts on which the settlement was made. The party must know the defect he is waiving. C. C. 2272, 1786; C. N. 1338; 23 Ann. 538; 15 Ann. 569; Bigelow on Estoppel, p. 489, *et seq.*
16. Receipts given by heirs to an executor "in full settlement of their interest" in an estate, are not conclusive. 12 Ann. 775; 4 Howard, 561; 21 Ann. 532; 29 Ann. 446; C. C. 1312 and 1317.
17. A substitution and *fidei commissa* cannot be cured by time—no prescription applies. 13 Ann. 575; 11 R. 312; 3 Ann. 329; 29 Ann. 120; 15 Ann. 702.
18. A judgment absolutely null can be the basis of prescription. 24 Ann. 233; 1 N. S. 9.
19. In case of error and fraud, prescription runs from its discovery. C. P. 613; H. 1213-1-4; L. p. 566-2-6.
20. The prescription of five years applies to an action to annul a testament, donations, etc., and in case of minors this prescription begins to run after majority. C. C. 3542.

John A. Richardson and Watkins & Watkins for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. Josephus S. Barrow died in 1878, leaving the following testament:

STATE OF LOUISIANA, }
PARISH OF CLAIBORNE. }

Know all men by these presents, that I, Josephus S. Barrow, of the State and parish aforesaid, knowing the uncertainty of life and the certainty of death, being in feeble and bad health, but possessed of a sound and disposing mind, have this day, the sixth of February, A. D. 1875, feeling it to be a duty I owe to my family, have this day made and

written with my own hand this my last will and testament. In the name of God, amen, hereby revoking all those by me at any previous time made.

First—It is my will and desire that all my just debts, which are but few, together with my burial expenses, to be paid by my executors as soon as they may obtain funds sufficient to do the same from my estate.

Second—I hereby will and bequeath unto my beloved wife, Rebecca E. Barrow the following property, viz: A settlement of land on Middle Fork bayou, in the above State and parish, including my old homestead, containing 1000 acres more or less, including all the improvements thereon, together with all my household and kitchen furniture, together with all my real estate in Homer, except the store house and grocery occupied by Otts & Barrow, together with forty acres of land lying south of Homer, known as the Turner forty; also my two-horse buggy and harness, two sorrel mares, two cows and calves of her own choosing from my stock; also my two-horse wagon and harness.

Third—I also will and bequeath unto my daughter, Joanna, two thousand dollars in money, for which she holds my note; also my daughters, Dolly P., Ida Exar, and my sons, James L. and Charles E. the same amount, together with one horse, bridle and saddle each, one cow and calf each, to equalize them with all my other children that have left me heretofore.

Fourth—I also will and bequeath unto my son, A. W. Barrow, the brick store house and grocery in the town of Homer, upon condition that the said A. W. Barrow pay to the sons of J. W. Barrow five hundred dollars each when they become twenty-one years of age. If one of the sons of J. W. Barrow should die before arriving to be twenty-one, then the surviving brother should be entitled to the thousand dollars. If neither of them should live to be twenty-one, and the said sum not paid over to one or both of them, then said thousand dollars to be the property of A. W. Barrow, who has it in trust.

Fifth—Should my son, W. H. Barrow present himself within the time limited by the statute of this State, he shall be entitled to an interest of two thousand dollars in said store house and lot, to be held in trust by A. W. Barrow for the benefit of Wm. H. Barrow or his legal heirs. He or they receiving and receipting for the profits from said house as it may accumulate.

Sixth—I hereby appoint and ordain A. W. Barrow and W. P. Otts, Sr., my executors to effectually carry out and accomplish this my will, without giving bond, and to take full possession of all my estate

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which has not been disposed in this will, and sell and dispose of the same to the best of their judgment for the benefit of my wife, R. E. Barrow, A. W. Barrow, M. R. S. Nicholas, Joanna Barrow, Dolly P., Ida Exar, James L. and Charles Edwin Barrow.

(Signed)

J. S. BARROW.

Attested by six witnesses.

CODICIL.

STATE OF LOUISIANA, }
PARISH OF CLAIBORNE. }

I, Josephus S. Barrow, of the State and parish aforesaid, being greatly afflicted, but possessed of a sound and disposing mind, have this day added this codicil to the above will, which is my own will, written with my own hand, and I also write this codicil owing to the great depreciation in real estate. I do hereby will and ordain when my estate is wound up and my executors, if the store house and grocery occupied by A. W. Barrow and Otts is not worth \$5,000, then my son, A. W. Barrow, my executor, shall not pay W. H. Barrow or his heirs but half the amount specified in the above will to him, and also J. W. Barrow's two sons half the amount willed to them in the above will. Signed, sealed and delivered in the presence of the following witnesses January 1, 1876.

(Signed)

J. S. BARROW.

The clauses attacked give to A. W. Barrow a lot and brick store upon it, charged with the condition that A. W. Barrow shall pay to his absent brother, W. H. Barrow, when he presents himself and claims it, interest on \$2,000, out of A. W. Barrow's own means.

This is not a *fidei commissum* or substitution.

Succession of Cochrane, 29 Ann. 232. The clause of a will by which the testator gives a sum of money to a minor and directs that the same shall be invested so as to yield a revenue until the legatee's majority does not involve a substitution.

The devise of a certain sum to a minor, and in the event of her death to another, is not a prohibited substitution.

The doubtful clauses should be so construed as to give the will effect. A naked trust, to be executed immediately as where furniture is devised to a mother for the benefit of her minor child, is not a *fidei commissum*.

The will was presented for probate to the proper court of his domicile, and a judgment was rendered declaring the same proved and ordering its execution. A. W. Barrow, one of the executors appointed by the will, was duly qualified and confirmed.

An inventory was taken. The estate was administered, and in May,

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1878, the executor filed his final account, in which, after delivering the special legacies and paying the money legacies, he distributed the remainder amongst the heirs. This account was duly advertised. The service of the petition for its homologation, was accepted by the major heirs and by the legal representatives of the minors.

All the heirs received and gave receipts for their legacies, and also for the distributive shares coming to them under the account.

After due proceedings, judgment was rendered homologating the account and finally discharging the executor, which was signed on June 24, 1878.

The present suit was instituted by the petitioning heirs in 1886, nearly eight years afterwards.

The petition propounds the following grounds of action :

1st. That the entire will is a nullity for want of compliance with the forms of law in its execution.

2. That clauses four and five of the will are null, as containing prohibited substitutions and *fidei commissa*.

3d. That "for the abovementioned reasons" (to-wit: the alleged nullities in the will) "the pretended testament and the judgment homologating the same are absolute nullities."

4th. That A. W. Barrow had received large advantages from the decedent, which he was bound to collate.

5th. It pleads "error and fraud in the settlement of the estate of J. S. Barrow, deceased, by A. W. Barrow," without the slightest specification of the nature or grounds of such error or fraud.

Upon these grounds, plaintiffs ask a judgment decreeing the nullity of the will and especially the clauses four and five thereof; decreeing the nullity of the judgment probating the will and of the judgment homologating the executor's final account; decreeing that plaintiffs recover of defendant their interest as heirs in the brick store house and lot bequeathed to him by said clause four of the will; and finally condemning defendant to account for and collate to plaintiffs a large amount which he had received in excess of his interest as heir.

To this petition defendant filed several peremptory exceptions and pleas, amongst which may be mentioned :

1st. No cause of action.

2d. Estoppel resulting from the judgments probating the will and homologating the executor's final account and discharging him, and from the settlement and receipts in accordance with said account.

3d. Prescription.

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From a judgment sustaining the exceptions and pleas generally, and dismissing the suit, the plaintiffs prosecute the present appeal.

We think all the heirs, with the exception of J. W. Barrow, are conclusively estopped from prosecuting the present suit by the probate proceedings and the settlements effected thereunder.

Those proceedings and the settlement are to be considered together.

Without nicely discussing the technical validity of the citations and acceptance of service of petitions, it is apparent that the major heirs and the legal representatives of the minor heirs were fully notified of all the proceedings therein and took cognizance thereof; that they fully confirmed and ratified them; that they accepted and receipted for their legacies under the will, and also for their distributive shares as heirs in the residue as ascertained by the final account; and that, upon the faith of their said acceptance and receipts, the judgment was rendered homologating the account and finally discharging the executor.

As was said in another case, "the heirs ratified and confirmed the will; they were recognized and put in possession of their respective shares; his succession has been fully administered and his executors have been discharged.

After all these proceedings and in the face of their solemn acts, the heirs cannot be heard when they seek to annul the will in any of its parts." *Heirs of Johnson vs. Johnson*, 26 Ann. 572; see also *Suc. McCloskey*, 29 Ann. 406.

The minority of some of plaintiffs cannot protect them from this estoppel. They are bound by the acts of their legal representatives, acting within the scope of the powers conferred upon them by law. *Heroman vs. Institute*, 34 Ann. 813.

Neither is the estoppel defeated by the vague allegation of error and fraud contained in the petition. We have quoted heretofore the sole allegation contained in the petition on that subject, and one so vague and indefinite goes for naught. Besides, so far as the validity of the will was concerned, it is apparent there was no room for error or fraud.

The will being thus protected from attack, its terms are sufficient to cut off any claim for collation of advantages previously received by heirs; for the third clause of the will shows conclusively that the legacies therein made to certain heirs were intended "to equalize them with all my other children," which, under art. 1233, C. C., is a sufficient indication of the testator's intention to exclude all question of collation of previous advantages.

These views dispose of the case of all the plaintiffs except John W. Barrow. He was a minor without any legal representative, and he is

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not bound by any of the proceedings in the succession of J. S. Barrow, nor has he, in any manner shown by this record, been settled with, or ratified or confirmed the proceedings.

Unless he is concluded by the plea of prescription, we see nothing to prevent his prosecuting the present action.

The action is prescribed by five years. C. C. 3542; Heirs of Miller vs. Ober, 34 Ann. 592.

The prescription commences to run only from his majority. The evidence shows that he was four or five years old in 1863. Hence he must have attained his majority at least in 1880, and as this suit was filed only in 1886, the prescriptive term had expired.

On the whole, we think the judgment appealed from has done justice.

Judgment affirmed.

 No. 1156.

MRS. G. J. DAVIE AND HUSBAND VS. MRS. BETTIE SCRIBER ET AL.

1. Under the Act of April, 1853, and the Constitution of 1864, the clerk had no authority to grant an order of seizure and sale.
2. Article 990, Code of Practice, does not contemplate sales of property of estates made at the instance of succession representatives, but such as are applied for by creditors only.
3. Under the provisions of the Constitutions of 1845, 1852 and 1864, and statutes enforcing them, clerks had jurisdiction and authority to grant orders for the sale of succession property. 12 Ann. 56, Succession of Boyd; 21 Ann. 505, Wood vs. Lee.
4. The clerk having been possessed of jurisdiction to grant the order, same protects the adjudicatee and subsequent purchasers.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

C. J. & J. S. Boatner for Plaintiff and Appellant.

Franklin Garrett for Defendants and Appellants.

The opinion of the Court was delivered by

WATKINS, J. Plaintiff, as forced heir of Francis Sheppard, whose intestate succession was opened in the parish of Ouachita in 1863, and of which his surviving widow qualified as the administratrix, sues for the revocation of a judicial sale of certain real estate of which the decedent died possessed, and which is alleged to consist of an undivided one half interest in a certain plantation situated on Bayou de Siard, of four hundred acres, and which is alleged to have been appraised in the inventory at \$8 per acre, or \$3,200.

She alleges that she was a minor at her father's death. That on the

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28th of September, 1867, upon the application of the attorneys of Samuel L. Sheppard—an alleged creditor of the said succession—the clerk of the Twelfth District Court for the Parish of Ouachita rendered an order directing the sheriff to sell all the property of said estate, or so much thereof as should be necessary to satisfy his claims. The property was adjudicated to R. G. Cobb, on the 4th of January, 1868, from whom, by several mesne conveyances, defendant acquired title, under which she now holds. Plaintiff alleges that the adjudication was an absolute nullity, and conveyed no title, because, among other reasons assigned, “the clerk of the court who granted the order prayed for, was *absolutely without* authority or jurisdiction to entertain the same, or to make any order thereon,” and she prays judgment accordingly.

The different defendants and warrantors respectively tendered various exceptions, and answers subsequently and calls in warranty, in which they substantially assert the legality of the order of sale complained of and the consequent legality of the adjudication to R. G. Cobb.

The decision of this case must depend upon the legality, or the illegality, of the order of sale, as it, in our opinion, is the only question propounded by the plaintiffs that can seriously affect defendant's title.

Plaintiff's counsel relies upon 12 Ann. 68, Mason's ex'rs vs. Fuller, as authority for the position he has assumed. In that case plaintiff enjoined what the Court considered as an order of seizure and sale. The Court say: “In pursuance of the Article of our present Constitution (1852), the Act of April, 1853, empowered the clerks of courts, amongst other things, “to grant orders for the sale of succession property. We interpret this to mean *such orders as* are required, or are asked for by curators, administrators and executors in the regular course of their administration; *such orders as* they ask for the sale of so much property as may be necessary to pay the debts in general, which are exigible; orders which are therefore properly granted *ex parte*.

“Here the applicant for the order is not an executor, but a creditor acting *adversely* to the executor; that is, he seeks to compel a sale of the property under the administration of the executor * * * and, finally, the order is *not* to sell *property* of the succession to pay debts *in general*, but to sell a *specific piece* of property on which a vendor's privilege is claimed, to pay by preference a specific debt, held by the creditor who seeks to procure the order, in a petition drawn up nearly in the form of a petition for a seizure and sale.

“The creditor should have resorted to the district court either to

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procure an order of seizure and sale, or a rule on the executor to show cause why the property should not be sold according to Articles 991 and 992 of the Code of Practice."

Article of Code of Practice 990 provides that it shall be the duty of the several judges of probate, "upon the *application of the creditors, or any creditor*, of a vacant estate, to cause * * * so much of the property of the said estate as may be necessary to pay the debts of the same *that may be due*, to be offered for sale," etc.

This article does not contemplate sales of succession property made at the instance of succession representatives. They are governed by provisions of the Civil Code. The sales contemplated in said articles are such *only* as may be provoked by creditors. 33 Ann. 471, Succession of Hood; 16 Ann. 420.

Under the provisions of the Constitutions of 1845, 1852 and 1864, the Legislature had power to vest in clerks of courts authority to grant such orders, and do such acts as they should deem necessary for the furtherance of the administration of justice.

Act 56 of 1855, conferred upon the clerks of the several district courts the power "*to grant orders for the sale of succession property.*"

In 12 Ann. 611, Succession of Boyd, the Court said: "The Constitution has authorized the Legislature to confer the power upon clerks to make certain *judicial orders*. These orders, when rendered by the clerk in the special cases authorized, have *precisely the same effect* as they would have if rendered by the judge himself under the same circumstances."

Under the Constitution of 1845, Act 141 of 1850 declared "that the clerks of the several district courts shall have power to grant orders for the sale of property of successions."

This statute was examined and passed upon by this Court's predecessor in Woods vs. Lee, 21 Ann. 505, in which they say: "This is an action by the heirs of E. E. Wood to annul the probate sale of a tract of land * * * made on the 28th of February, 1851, to one Joseph D. Lee, from whom the defendants acquired, on the following grounds, viz:

"*First. The order of sale is insufficient, and void because the clerk had no authority to make it.*"

Again: "The order of sale in this case was made by the clerk who was specially authorized thereto by the Act of 1850, p. 100, and it had the same effect as if made by the judge."

That case is precisely in point. As the clerk had jurisdiction, his order protects the adjudicatee and all subsequent purchasers. 14 Ann. 622, Succession of Guiney; 21 Ann. 507, Woods vs. Lee.

Judgment affirmed.

Friedman Brothers vs. Lemle.

No. 1155.

FRIEDMAN BROTHERS VS. JOSHUA LEMLE--J. LEMLE, INTERVENOR.

Where a third person appeals suspensively from a judgment making peremptory a mandamus directing the sheriff to accept a bond which has been tendered for release of property attached and to release the attachments, and where the condition of the appeal bond is "to satisfy whatever judgment may be rendered against the *appellant*," the obligations of the bond are restricted to the condition so expressed and, on failure to prosecute the appeal, cannot be extended to embrace an obligation to satisfy the judgment which had been rendered against the sheriff, or to pay general damages occasioned by the appeal.

Nor can the principal be held for damages outside of the terms of the bond, without proof of malice and want of probable cause. His position is similar to that of the original prosecutor of a civil suit, except in so far as the law has made a distinction between them in the requirement of bond.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

Millsaps & Sholars and A. Golthwaite for Plaintiffs and Appellees:

C. J. & J. S. Boatner for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. Plaintiffs, as creditors of Joshua Lemle individually, sued him and attached his stock of goods. Various other creditors levied similar attachments.

A firm, styling itself J. Lemle, and alleging itself to be composed of Joshua and Julius Lemle, intervened in the proceedings and claiming ownership of the goods, applied for and obtained an order of court permitting it to release the same on bond. The firm thereupon tendered to the sheriff a bond in the sum of \$19,974.50 conditioned according to law and with sureties which, however, the sheriff refused to accept. The firm then applied to the court for a writ of mandamus on the sheriff to compel him to accept the bond and release the property. After due proceedings, the mandamus was made peremptory.

The plaintiffs, together with several other attaching creditors, thereupon presented a joint petition representing that, though not parties to the mandamus proceeding, they had an appealable interest therein, and praying to be allowed a suspensive appeal from said judgment which was granted, returnable to this Court in June, 1885, upon their executing a bond for a suspensive appeal conditioned according to law, in the sum of twenty thousand dollars. The bond was executed in January, 1885.

It appears that *prior* to the application of J. Lemle to bond, certain of the creditors, *not including plaintiffs*, had applied for and obtained an order for the sale of the goods as being perishable, and J. Lemle hav-

ing failed to release on bond owing to the suspensive appeal in the mandamus proceeding, said order went to execution and the goods were sold. It does not appear that J. Lemle made the slightest opposition to the execution of this order though, under the peculiar circumstances, they might, perhaps, have successfully done so, until their timely application to release on bond had been finally determined.

However, the goods having been sold long prior to the return day of the appeal from the mandamus judgment, of course the marrow was taken out of that controversy and the appeal was abandoned.

Although plaintiffs' suit was filed on December 12, 1884, it was not put at issue by answer until September, 1885, when defendant pleaded a general denial to the claim of plaintiffs; and then assuming the character of plaintiff in reconvention, and claiming to be liquidator of the firm of J. Lemle, dissolution of which was alleged, he sets forth the facts heretofore recited touching the suspensive appeal from the mandamus judgment, and the failure of plaintiffs to prosecute the same; avers that the sale of his goods was the consequence of said appeal; that it resulted in a sacrifice of said goods at a price far below their value in his hands had he not been prevented from releasing the same on bond, occasioning him a loss on that account of \$10,100; sets forth other damage to his business, his credit, etc., to a large amount; prays for citation of Sigmund and Herman Meyer, sureties on the suspensive appeal bond; and for judgment against plaintiffs and said sureties *in solido* in the sum of \$20,000, the full amount of the bond, and against plaintiffs in the further sum of forty-nine hundred dollars.

Waiving objections to the mode of proceeding, which are serious, we prefer to consider the merits of the reconventional demand, which we shall do under two aspects, viz:

1st. Whether plaintiffs and their sureties are liable for the damages claimed, contractually, under the terms of the bond.

2d. Whether plaintiffs are liable otherwise.

We solve the first question in the negative on two grounds.

1. The condition of the bond is in the following terms:

"Now, therefore, if the said Friedman Brothers (and others, naming them), shall well and truly prosecute their said appeal with effect, and shall satisfy whatever judgment may be rendered against them, or that the same shall be satisfied out of the proceeds of the sale of their estate, real and personal, if they be cast in their said appeal, then this obligation to be null and void, otherwise to be and remain in full force and effect against principal and security."

The failure of plaintiffs to prosecute this appeal placed them in the same position which they would have occupied had their appeal been

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prosecuted and resulted in a decree of this Court affirming the judgment. As that judgment was not against them, but was solely against the sheriff, and as the bond did not bind the parties to satisfy any judgment against the sheriff, and as the only judgment which could have been rendered against Friedman Bros., would have been for costs of appeal, it is manifest that, under the terms of this bond, the parties were not bound to satisfy the judgment against the sheriff.

It is possible that, under a reasonable construction of articles 571 and 579 of the Code of Practice, the third person appealing suspensively from a judgment against a defendant might be required to condition the bond "to satisfy whatever judgment may be rendered against" the *defendant*. But such was not the bond furnished in this case.

As was said in one case, "we must take the bond as it is, not as it might have been or as the court might have ordered it to be made." Cartwright vs. McMillan, 3 Ann. 685.

And in another: "We are not permitted to extend the obligation of the surety beyond what is contained in the bond itself and what the law has declared to be the legal obligation of the surety in such a case, which is to satisfy whatever judgment may be rendered against the appellant." Parham vs. Cobb, 9 Ann. 426.

(See *erratum* at beginning of volume showing that the opinion above quoted from, though styled a dissenting opinion was, on that point, the opinion of the Court.)

A very pertinent and weighty opinion by the Supreme Court of Maryland in a case very analogous is quoted, where the same view is taken. It is there said: "The appellants contend that, by the failure to prosecute the appeal, the condition was broken, the right of action thereupon accrued and that the measure of damages is the loss occasioned by the appeal. If we were at liberty to decide this case according to principles of equity, etc., we should have little hesitation in assenting to the appellant's views; but the obligation is defined and limited by the terms of the bond and cannot be extended beyond their legal import and effect. * * By the terms of the bond the obligors bound themselves to prosecute the appeal with effect, and in the event of failure to do so, the condition expressly declares what the obligors shall pay." Fullerton vs. Miller, 22 Md. 1.

2. The foregoing might be sufficient on this point; but we may express, in addition, our serious doubt whether, even if the bond had bound the obligors to satisfy the judgment against the sheriff, the action of the Court in ordering the sale of the property at the demand

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of parties other than plaintiff, in the exercise of jurisdictional power and without objection by defendant, would not have been a *vis major* relieving plaintiffs and their sureties from their obligations under such a bond.

Now on the question of the extra-contractual liability of Friedman Bros., the foregoing suggestion is entitled to great weight. But in addition thereto, the attempt of defendant to assimilate the liability of an unsuccessful appellant to that of a plaintiff in a wrongful attachment or other proceeding by conservatory process, cannot be sustained. The differences between them are too marked to escape notice or to need enumeration.

The right of appeal is, as has been frequently said, a constitutional right. Its object is to submit to the appellate tribunal the final determination of controverted rights. The position of the appellant cannot be distinguished from that of the plaintiff in the original suit who seeks to submit the same rights to primary judicial determination. No distinction can be made between the two, except such as the law has expressly made in the bonds required. Outside of those bonds, their cases are identical, and the same conditions must exist in order to subject them to any liability outside of such bonds, viz: malice and want of probable cause.

Those conditions have no existence in this case.

We are satisfied the judgment appealed from enforced the law and awarded justice.

Judgment affirmed.

No. 1152.

ROBERT G. RICHARDSON ET AL. VS. ROBERT RICHARDSON,—MRS. S. F. HEAD, INTERVENOR.

The forced heirs of a married woman have a legal right to sue the surviving husband for a specific amount of paraphernal funds of their deceased mother received by the father, if the latter has not been confirmed and qualified as their tutor during their minority. In such a case the father is their debtor under the rights of the mother, and they can enforce all her rights without recourse to an action for an account.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

Potts & Hudson for Plaintiffs and Appellees:

First—Intervenors must take the case as they find it, and cannot object to the manner in which the suit is brought. 20 Ann. 174; 19 L. 135; 4 N. S. 487; 8 R. 123; 21 Ann. 118; 27 Ann. 239.

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Second—To enforce a claim for paraphernal funds against the father, inherited by a child from a deceased mother, neither a tutorship nor settlement of tutorship is necessary. 28 Ann. 830; 31 Ann. 533.

Third—A suit brought by an emancipated son and daughter against their father on account of a claim derived as heirs of their deceased mother is not a suit growing out of a tutorship, and where they thus sue as heirs no tutorship nor settlement of tutorship is necessary. 31 Ann. 533; 28 Ann. 830.

Fourth—The payment or receipt of an amount over \$500 may be proven by one witness. Art. 2277 (3257) C. C. applies only to contracts. 1 N. S. 416. 8 Ann. 307; 18 Ann. 210; 21 Ann. 54; 20 Ann.

T. O. Benton for Defendant.

C. J. & J. S. Boatner for Intervenor and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiffs are emancipated minors, issue of the defendant's marriage with their deceased mother, and they seek as her heirs at law to enforce the claims of their mother for the restitution of her paraphernal funds received by the husband and converted to his own use and benefit, with a recognition of a legal mortgage on his immovable property.

He pleaded the general denial, but he makes no serious defence.

The real contest is between the plaintiff and the intervenor, who is a judgment creditor of the defendant and who resists the claim of the former, in so far as it may outrank her mortgage on the only remaining immovable property owned by the defendant.

She appeals from an adverse judgment; and she urges three grounds of resistance to plaintiffs pretensions.

1. That their action against their father should have been for an account, and not for a specific amount.

2. That the testimony offered by plaintiffs is not sufficient to make legal proof of their claim.

3. That the burden of proof was on plaintiffs to show that the funds alleged to have been received for account of his wife constituted her separate assets as being due to her before marriage.

I.

Conceding *arguendo* the right of intervenor to make this point, we find that plaintiffs urge no claim against their father as tutor; the record shows that he has never been confirmed or qualified as their natural tutor.

They are only claiming the rights which they have inherited from their mother, hence they are entitled to the same remedy which she could invoke, if living, for the restitution of her paraphernal funds received by her husband and converted to his own use.

At her death plaintiffs became the creditors of the surviving husband to the extent of their virile shares in the rights of their mother against the husband, and nothing has since occurred to alter or modify the relations which they have occupied towards their father, and *quoad* their claim and to the extent of their respective shares therein, their position was precisely that which their mother held before and at the time of her death.

Now we know of no law or rule of jurisprudence which would restrict the action of the wife seeking the restitution of her paraphernal funds from her husband, to a demand for an account.

The books show that in such cases the demand has always been for a specific amount; and the right of enforcing such a demand has been inherited by these plaintiffs directly from their mother.

The exercise of the precise remedy herein sought has been sanctioned by this Court, and is derived from our code. C. C. Art. 945; *Bridger vs. Simonton*, 28 Ann. 830; *Cambre vs. Grobert et al.*, 31 Ann. 533.

II.

As to the insufficiency of the evidence, intervenor contends that the only direct evidence of the amounts alleged to have been received by the defendant, of the time, of the mode of payment, and of the sources consists of the uncorroborated testimony of the defendant himself, who is testifying in behalf of his children.

It is perhaps unfortunate that many of the witnesses, such as the former tutor of the wife and several of her debtors, who could have thrown abundant light on the subject, are now dead.

But nevertheless we find in the record sufficient evidence, both documentary and parol, which leaves no doubt in our minds that the defendant did at various times and in sundry amounts receive after his marriage with Fanny Gurton, in good currency, a sum aggregating \$11,500, and that the whole amount was used by him as his own funds.

It would serve no useful purpose in jurisprudence to encumber this opinion with a recital in detail of the evidence which has led us to this conclusion.

III.

But the intervenor contends that the bulk of the moneys received for account of his wife by the defendant consisted of fruits of her paraphernal assets, principally the hire of slaves, of which he had the administration, and which therefore fell in the community.

On this point the record shows substantially:

That when the marriage took place in December, 1862, the wife was a minor, and that her property, consisting mainly of money and

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slaves, was under the control of her tutor, and that very soon thereafter the husband took service in the Confederate army and did not return to his home permanently until the end of the war, in 1865; and that portions of his wife's paraphernal assets were paid to him during the war, but that no final account of tutorship was presented before the month of November, 1865.

In the mean time the wife's estate remained under the management and control of her former tutor, who was also her uncle, and no attempt has even been made to show that the husband ever interfered with his wife's chosen agent, either in the hire of her slaves or in the investment of her funds.

Hence we conclude that the husband did not assume the administration of the separate estate of his wife before the year 1865, at which time he had already received the funds which form the basis of plaintiff's demand, and that therefore these sums were paraphernal assets of the wife. The legal mortgage securing these funds has been preserved by proper and timely inscription, and it is entitled to the rank provided for it by law.

Considering the source of intervenor's claim, and the sacred character of defendant's indebtedness to her, we deeply regret the loss to which our judgment will subject her, but at the imperative command of law the voice of equity is hushed, and judges must perform their duty without regard to consequences.

The amounts allowed plaintiffs by the district judge are correct under the evidence, and his conclusions are sustained.

Judgment affirmed.

No. 1147.

THE STATE OF LOUISIANA VS. JOHN KEENAN.

The rule is that dying declarations are admissible if made under a sense of impending dissolution, which soon thereafter transpires. 1 Gif. sec. 158; 30 Ann. 365; 31 Ann. 95; 32 Ann. 1086; 36 Ann. 920, *State vs. Moliss*.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Baker, J.

M. J. Cunningham, Attorney General, and *Lionel Adams*, District Attorney, for the State, Appellee:

1. A dying declaration made under an immediate sense of impending dissolution is admissible in evidence. 30 Ann. 362; 31 Ann. 95; 32 Ann. 1086; Wharton Cr. Ev. § 281.
2. There is no law making it necessary for the dying man to say that he believes he will immediately die, as a condition precedent to the validity of his declaration as evidence;

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it is sufficient if such belief is established by his actions and the surrounding circumstances. Wharton Cr. Ev. §§ 282, 284.

Wm. R. Whitaker for Defendant and Appellant:

Declarations by the person whose death is the subject of investigation concerning the cause of death or its attendant circumstances, are admissible; provided, the court be satisfied that such declarations were made in solemn contemplation of immediately approaching death. Best Ev. § 505, n. 1; 1 Greenl. Ev. § 156, et seq.; Whar. Hom. §§ 742-775; State vs. Cornish, 5 Harr. (Del.) 502; Bull vs. Com., 14 Grat. 613; Hill vs. State, 41 Geo. 484; Dixon vs. State, 13 Fla. 636; State vs. Simon, 50 Mo. 370; People vs. Hogdon, 55 Cal. 72; Sullivan vs. Com., 93 Pa. St. 284, 296; State vs. Patterson, 45 Vt. 308; West vs. State, 7 Tex. Ct. App. 150.

While it rests with the court to decide on the admissibility of a statement offered as a dying declaration, a strictly legal discretion must be exercised; and if it decide for the admission of the declaration, it must be for one, or both, of two reasons:

First. That the declarant had expressly stated his own sense of his immediately approaching death; or,

Second. That from the testimony it is apparent that declarant must have been assured of such impending dissolution.

1 Greenl. Ev. § 156; 1 East P. C. 354. 1 Denis C. C. 1; Rex vs. Van Butchell, 3 Carr. & P. 493; 2 Parker C. R. 235; Rex vs. Pike, 3 Carr. & P. 598; Rex vs. Hucks, 1 Stark N. P. C. 523; 1 Phill. Ev. 235, 85; Carr. Supp. 232, 1 Arch. 449; Whar. Cr. Ev. §§ 276-281, 284; Best Ev. p. 485; Com. vs. Cooper, 5 All. 495; Montgomery vs. State, 11 Ohio, 424; Morgan vs. State, 31 Ind. 193; People vs. Grunzig, 1 Parker C. C. 299; Brakefield vs. State, 1 Sneed, 215; People vs. Perry, 8 Abb (N. Y.) Prac. N. S. 27, 34; Lewis vs. State, 9 Sm. & M. (Miss.) 115; State vs. Trivas, 32 Ann. 1086; State vs. Spencer, 30 Ann. 362; State vs. Molfese, 36 Ann. 920.

The decision of the trial court on the matter of the admission of a statement offered as a dying declaration is proper subject for review. Whar. Cr. Ev. § 298, Com. vs. Dunan, 128 Mass. 422; Sullivan vs. Com., 93 Pa. St. 284; Donnelly vs. State, 2 Dutch. 463, 601; State vs. Trivas, 32 Ann. 1086.

The opinion of the Court was delivered by

WATKINS, J. The accused was indicted with another for the murder of one John J. Madden, separately tried, and from a verdict of "guilty without capital punishment," and sentence, he has appealed.

This appeal rests upon a single bill of exceptions reserved for the accused to the admission, as evidence, of the dying declarations of the deceased. He complains that it had not been shown, either by oral testimony of witnesses, or by the language of the declaration itself, or in any other way, that the deceased was, before making said declaration, or at the time of making same, in contemplation of approaching or impending death.

The declaration of deceased was dictated by himself, and was reduced to writing by T. J. Mooney, recorder.

From the declaration itself we gather the following statement of facts, viz: That on the 25th of June, 1884, at the hour of 2 A. M., he was shot by one of two men who were strangers to him. He was a police-

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man at the time, and had previously arrested them and they were in his custody.

This occurred in Algiers. He said he would know the men if he should see them again. The one standing by the corporal at the end of the table, he said was the tallest man. He concluded his statement by saying: "I make this statement to you because I have given up hopes of recovery, and believe that I am going to die."

It further appears that from the facts summarized in the bill of exceptions, that the recorder visited the deceased during the day subsequent to the assault upon him, on which occasion he said that he thought he would get well.

It further appears that on the following day, between 3 and 4 o'clock A. M., the recorder was again sent for, and upon his arrival he found Madden quite weak, and who, when he was questioned by the recorder as to how he felt, responded that he had given up and thought he was a case, or that "he was gone up."

Before proceeding to write the dying declaration, the recorder warned him to be careful as to what he should say, as he was going before his Maker, and that if he did not believe that he was going to die his declaration would not be worth the paper it was written on, to which Madden responded "that he did not wish to die with a lie in his mouth."

He thereupon made to the recorder the statement detailed above, and he reduced it to writing as dictated by him, in the presence of witnesses.

Madden died on the day following. From the evidence it does not appear that his physical condition was subsequently improved, or that the patient thereafter entertained hopes of recovery.

The trial judge, in his reasons, assigned that he was satisfied from the expressions of the deceased, and his condition just prior to the declaration, that he was fully aware of his condition, and had no hope of recovery, at the time, and admitted the evidence.

Dying declarations are those made under a consciousness of impending death, which, however, the declarant need not express in direct terms. His bodily condition and appearance; his conduct and language; as well as statements made to him by his attendants, may be considered, and his consciousness thence inferred. 12 Ann. 274, State vs. Scott.

We do not conceive it to have been necessary that the deceased should have said that he believed he would die *immediately*, but regard it sufficient, if the facts detailed were such as to indicate that the de-

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ceased was conscious, at the time of making his declaration, of his *approaching* dissolution.

To render such declarations receivable in evidence, the deceased need not have been at the time *in articulo mortis*. It was only necessary that same should have been made under a sense of *impending* dissolution, which soon thereafter occurred.

To this sense of approaching death, the law attaches the solemnity of an oath, and impresses upon a statement made under it, the character of evidence.

Of this solemnity the deceased was clearly impressed, because, when he was cautioned by the recorder as to the statement he desired to make, he said that he *did not wish to die with a lie upon his lips*. 30 Ann. 365, State vs. Judge Spencer; 31 Ann. 95, State vs. Daniel; 32 Ann. 1086, State vs. Trivass; 36 Ann. 920, State vs. Molisse.

The ruling of the judge *a quo* was correct, and the judgment appealed from is affirmed.

No. 1161.

WHEELER & PIERSON VS. G. A. PETERKIN ET AL.

The omission of appellant to ask for citation of appeal and to have it served on appellee, when the order of appeal has been granted on motion in open court at a term different from that on which the judgment was rendered, is fatal to the appeal, which must be dismissed.

A PPEAL from the Sixth District Court, Parish of Morehouse.
Bussey, J.

Todd & Todd for Plaintiffs and Appellants.

C. Newton for Defendants and Appellees.

The opinion of the Court was delivered by
POCHÉ, J. The motion to dismiss this appeal must prevail.

The judgment appealed from was rendered on the 26th of May, 1885, and the order of appeal was granted on motion of appellants' counsel in open court on the 18th of January, 1886, and at a different term of the court than that at which the judgment was rendered.

No citation was asked by appellants and none was served on appellees. Under the circumstances a citation of appeal was as imperatively necessary to perfect the appeal as an ordinary citation is indispensable to support an ordinary action, and the absence of a citation in this case is clearly and inclusively imputable to the fault of appellants.

The only condition under which the necessity of a citation of appeal

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is obviated, is when the party who intends to appeal does so by motion in open court at the same term at which the judgment was rendered. Code of Practice, art. 573.

That provision of our Code is unambiguous and mandatory; it has uniformly been construed so as to defeat the appellant whenever he failed to ask for and to secure a citation of appeal, under an order granted either on petition in chambers or on motion in open court at a term different from that at which the judgment was rendered. *Walker vs. Martolo*, 16 La. 50; *Bolling vs. Anderson*, 10 Ann. 650; *Pratt vs. Erwin*, 5 Ann. 115; *St. Romes vs. Sterling*, 21 Ann. 277; *Potier vs. Thibodaux*, 21 Ann. 618; *Hardy vs. Stevenson*, 27 Ann. 95; *Fournet vs. Van Wickle*, 33 Ann. 1108.

The appeal is therefore dismissed at appellants' costs.

No. 1162.

HELEN STAFFORD AND CURATOR AD LITEM VS. SUCCESSION OF W. S. MCINTOSH.

A creditor who has an unliquidated and unacknowledged demand against a succession is not bound to procure the rendition and effect the liquidation of his claim and its recognition and enforcement by an opposition to the account, but may proceed at once by an independent and direct action for that purpose.

A PPEAL from the Twenty-seventh District Court, Parish of Richland. *Ellis, J.*, to whom the case was referred.

David Todd for Plaintiff and Appellant:

Where the administrator has filed his tableau and account, any creditor not recognized therein has a right to sue the succession that owes him and have his claim recognized by judgment. 10 Ann. 224; 3 Ann. 407; 5 R. 270; C. P. 984-6; 19 L. 441; 7 Ann. 367; 5 Ann. 709; 23 Ann. 102; 28 Ann. 322; 2 N. S. 659; 5 N. S. 218; 6 N. S. 450; 1st Rob. 389-404; 3 R. 264; 9 Ann. 500.

Such creditor has also the alternative right to oppose such tableau until his rights and claim are recognized and placed on such tableau. C. C. 1180; 8 Ann. 451; 10 Ann. 224; 10 L. 358; 18 L. 264-583; 23 Ann. 528; 12 Ann. 517.

E. C. Montgomery and *Boatner & Boatner* on the same side.

Wells & Toler for Defendant and Appellee.

The opinion of the Court was delivered by

TODD, J. The plaintiff is the only issue of the marriage of J. J. C. and Margaret A. Stafford, who both died in the parish of Richland—Mrs. Stafford in 1872, and Mr. Stafford in 1876.

Shortly after the death of plaintiff's father, Wm. S. McIntosh was appointed her tutor, and about the same time administrator of the suc-

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cession of Mrs. Stafford. As administrator and tutor he received the property of the succession, and besides that of the minor valued at about \$35,000. Part of this he caused to be sold and received the proceeds. He collected the rents and revenues, and thus many thousand dollars went into his hands. McIntosh continued in the control and possession of these estates till 1883, when he died. He died without filing any account of his administration, though he left an account of his tutorship never homologated. Shortly after the death of McIntosh, David T. Chapman was appointed and qualified as administrator of his succession. Not long after his appointment, he filed a provisional account and tableau of debts of McIntosh's succession. This account completely ignored the debt owing by McIntosh to the plaintiff.

Thereupon the plaintiff, having been emancipated, brought the present suit, in which she set forth in her petition at length and with great clearness, the indebtedness of McIntosh to her and the specific causes of that indebtedness; that he had gone into possession of all her property, received the fruits of it, had sold part of it and collected the proceeds, and had never paid over to her or her representatives anything, nor filed any account.

The action was brought and the petition formulated to comply precisely with the letter and with the provisions of art. 986 of the C. P., as will be seen from a perusal of it. It reads as follows:

"If the claim (claim in favor of a succession) be not liquidated, or if the curator or testamentary executor or administrator have any objection to it, and consequently refuse to approve it, the bearer of the evidence of such claim may bring his action against the curator or administrator in the ordinary manner before the court of probate where the succession was opened, or before the district court, according to the amount involved, and obtain judgment in the same manner as in other cases."

The suit was, however, dismissed on an exception of no cause of action. There are certain words qualifying the judgment that may throw some light on the reasons of the judge for his ruling—the judge giving no reasons, at least in writing, in support of the same, and the defendant making no appearance in this Court whatever.

The judgment reads thus: "In this case the exception was overruled as to opposition in plaintiff's petition to account of W. S. McIntosh, tutor to the minor, Helen Stafford, and overruled as to opposition to account of D. T. Chapman, administrator of the succession of W. S. McIntosh, and sustained as to the demand of the plaintiff against D. J. Chapman, administrator."

One cannot read the petition without being convinced that plaintiff's

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sole object in bringing this suit was to liquidate the debt of the McIntosh succession to the Stafford succession. The suit may have intended to accomplish effectually what the judge *a quo* supposed, perhaps, could only have been done by oppositions to the accounts mentioned. But we find no word of opposition to the accounts in the petition, and no mention of the existence of said accounts except by way of recital. The fact was alleged in the petition that Chapman, in his account, had ignored entirely the claims of petitioner against the succession of McIntosh, and the administrator was asked to be cited, and was cited, and judgment prayed for against the McIntosh succession for the sums therein mentioned, amounting to some thirty thousand dollars.

We regard the petition as inaugurating an independent suit for the sole purpose of determining the indebtedness. It may be from the fact that it was asked that these accounts be not homologated until the plaintiff's claim could be liquidated by means of this suit, that it might have been contemplated by the plaintiff after her claim was liquidated that then she might, if to her advantage, compel the administrator, Chapman, to recognize the claim and place it among the debts of the succession. But the first thing to be done by the plaintiff was to have her claim liquidated, and that she was proceeding to do by her suit when it was improperly dismissed.

It might be inferred from the language of this decree that the judge was of opinion that it was the duty of Chapman, as the legal representative of W. S. McIntosh, administrator, to have filed the account of administration of the Stafford succession that McIntosh had failed to file. If so it was error, for it was not incumbent upon him to file such account, and he could not have been compelled to do it. He had nothing to do with Mrs. Stafford's succession. 1st Rob. 404; 12 Ann. 717.

We are not to be understood as meaning that settlements of the kind involved in this suit may not be effected by means of opposition, but however that may be, the law reserves to parties a special action to accomplish this purpose. And in this case it was not only legal but there was a marked propriety in resorting to this separate and independent suit. As stated, Chapman was doubtless an entire stranger to all the transactions between McIntosh and the Stafford succession and those also relating to the tutorship of the plaintiff. In all probability it would have been utterly impossible for Chapman to have prepared anything like an accurate or correct account of McIntosh's gestion with those estates. Therefore, the mode of proceeding adopted was highly favorable to the McIntosh succession, inasmuch as its administrator was accurately and explicitly informed of all the causes out of which

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it was charged that McIntosh's liability grew out of, and of all the facts surrounding the whole affair, whereby Chapman, administrator, was afforded the amplest opportunity for investigating and resisting, if he chose, the matters urged against him.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be annulled, avoided and reversed: and proceeding to render such judgment as should have been rendered, it is further ordered, adjudged and decreed that the exception of no cause of action be and the same is hereby overruled and the cause remanded and reinstated in its entirety, to be proceeded with according to law, at the costs of the defendant in both courts.

No. 1163.

WM. C. CULVERHOUSE ET AL. VS. JACOB MARX.—JAMES PEARSON,
WARRANTOR.

When peremptory exceptions filed *in limine* have been tried and overruled, and answers have been filed, and at a subsequent term the case has been fixed and taken up and is on trial on the merits, the judge has no authority to interrupt said trial, and, of his own motion, to set aside the former judgment on exceptions and grant a new trial thereof, and forthwith to hear them and render judgment thereon sustaining the exceptions and dismissing plaintiff's suit.

The exceptions, *as such*, were out of the case, and the judge had no more authority to reinstate and try them *as exceptions*, than he would have had to interpose such exceptions originally.

The right of judges to grant new trials *ex officio* is subject to the same delays which apply to parties.

The overruling of exceptions is not *res judicata* on the subject matter thereof and does not preclude the court from rendering a different ruling when the same matter is brought up anew in proper form, as by answer to the merits; but this principle does not authorize the court to revive a defunct exception, and by sustaining it, defeat and deny the trial on the merits, which has been regularly opened.

A PPEAL from the Third District Court, Parish of Union.
Holstead, Special Judge.

Thos. O. Benton and James A. Ramsey for Plaintiffs and Appellants.

Graham & Gaskins and J. E. Trimble for Defendants and Appellees:

1. The special judge ordered a new trial, *ex officio*, of the exception which had been passed upon by his predecessor, a special judge, and tried the exception. Plaintiff retained bill.

Courts have the legal right to order new trials, *ex officio*, and the exercise of this right is in their discretion. C. P. 547; H. D. P. 987, No. 7; 10 Ann. 766.

2. Plaintiffs alleging want of authority in counsel, who acted for them before the court, must, before they can require proof of their authority, deny it on oath. 27 Ann. p. 73^r and authority there cited; 26 Ann. 302; L. D. p. 70, Nos. 2, 3, 4 and 5.

3. Plaintiffs' petition discloses no cause of action. They claim the property as heirs of

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their mother, but show that defendant and warrantor hold under titles—and allege no reason why these titles should not stand in the way of their recovery. C. P. 44; L. D. p. 520, No. 7, also p. 521, No. 8.

4. The plea of *res adjudicata* filed in exception of defendant and warrantor estops plaintiffs from recovery in this suit. In former suit judgment was rendered on agreement of parties, giving plaintiffs \$567 50 instead of property claimed by them, and in terms settling the dispute between them. This judgment has become final, no appeal or action of nullity having been instituted. In the present suit the judgment is not attacked or mentioned.

The object of judgments is to settle disputes between parties, and it is as to the object of the judgment that the authority of the thing adjudged takes effect. C. C. 2286; 20 Ann. 285; H. D. p. 763, No. 2; 23 Ann. 618; 32 Ann. 882 and 898; 33 Ann. 617.

The opinion of the Court was delivered by

FENNER, J. This is a petitory action, to which the defendant and warrantor interposed *in limine* certain peremptory exceptions.

The judge of the court having recused himself, called Allen Barksdale, Esq., as judge *ad hoc* who, having duly qualified, heard the said exceptions at the November, 1885, term of the court, and rendered judgment overruling them.

Thereafter the cause went to issue on the merits by answers filed by defendant and warrantor.

The case was continued at two succeeding terms and at the April term of 1886, Mr. Barksdale, being unable to attend, proffered his resignation as judge *ad hoc* and J. B. Holstead, Esq., was appointed and qualified in his stead, who thereupon entered his order fixing the case for trial on April 13.

On that day the case was regularly called and taken up for trial, and all the pleadings in the case were read, when the special judge, *ex officio* and of his own motion, entered his order setting aside the former judgment which had been rendered on the exceptions and granted a new trial of said exceptions and, proceeding forthwith to trial thereof, he rendered his judgment sustaining the same and dismissing plaintiffs' suit.

To these proceedings of the judge, counsel for plaintiffs excepted and took a bill of exceptions which is brought up in the record.

The question which meets us at the threshold is as to correctness of the judge's proceeding. We can discover no warrant of law or authority to sustain it.

By the effect of the former judgment overruling them, the exceptions *as such* were out of the case; and the judge had no more right to reinstate and try them *as exceptions*, after the case had been opened on the merits, than he would have had to interpose such exceptions of his own motion, had the parties never filed them.

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It is true that judges have the right *ex officio* to grant new trials under art. 547, C. P., but that right can only be exercised ordinarily within the same delays which are allowed to parties to move therefor.

It is equally true that, so far as the overruling of an exception is concerned, the judgment is not *res judicata* on the subject matter thereof, and does not preclude the court from reversing its ruling when the same matter is brought up anew in proper form, as by answer to the merits. *Levy vs. Wise*, 15 Ann. 38.

But this does not authorize the court to revive a defunct exception, after a case is on trial on the merits, to try it separately, and thus to defeat the trial on the merits.

If the subject matters of the exceptions were involved in the issues on the merits the judge, after hearing the merits and in rendering judgment, might have well ruled on such matters according to his discretion without being bound by the former ruling.

But he erred in depriving plaintiff of his trial on the merits and of the opportunity of bringing his whole case before this tribunal.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed, and it is now adjudged and decreed that the case be remanded to the lower court, to be there proceeded with according to law and the views herein expressed.

 No. 1154.

AUGUSTE RAUXET VS. EMILE RAUXET.

A donation *inter vivos* duly accepted by the donee need not be accompanied by any other delivery.

A person who is alleged to be too ignorant of the English language to understand the meaning of an act of donation drawn in that language will be held bound by such an act, on proof that she understood the English language sufficiently well to dictate a will in that language.

All issues presented in a cause by the pleadings, on which evidence is introduced on trial, will be considered as disposed of by a final judgment, although the latter be silent on some of the issues in the case.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

T. O. Benton for Plaintiff and Appellee.

Robert Ray and *Robert Richardson* for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff sues for a partition by sale of a piece of im-

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movable property which he claims to own in indivision and in equal shares with the defendant, his brother.

Both are nephews of the original owner who died on the 28th of August, 1884.

Plaintiff claims title to one-half of the property under a donation *inter vivos* of date of June 18, 1884; and defendant lays claim to the whole property by the effect of a will of the deceased, the aunt of both, under date of May 30, 1884.

Hence he denies the alleged ownership of his brother to the half of the property, and he concludes with a prayer for a partition in kind in the event of a judgment favorable to plaintiff's ownership; claiming also reimbursement of moneys disbursed by him, on account of taxes due on his aunt's property during her lifetime, and judgment for sundry amounts alleged to be due to the succession by plaintiff.

Defendant sets up the nullity of the donation *inter vivos* in favor of plaintiff on the following grounds substantially:

1. Want of delivery of the property.
2. Want of acceptance by the donee.
3. That the donation was obtained by plaintiff by improper influences, fraudulent misrepresentations, and devices practiced on his aunt, who was at the time very old and very weak from sickness.
4. That the act of donation was signed by the donor in ignorance of its real meaning and effect, the same being in the English language which she did not know sufficiently to understand a legal document drawn in that language.

I AND II.

The first two grounds of alleged nullity are answered by the act which was authentic in form, and which recites the formal acceptance of the donee who signed the instrument for that purpose; and by art. 1550 of the Civil Code which reads: "A donation duly accepted, is perfect by the mere consent of the parties; and the ownership of the objects given is transferred to the donee, without the necessity of any other delivery."

On the third ground of nullity, the record is absolutely barren of any evidence of any representations made to the aunt by plaintiff, and hence we are powerless to ascertain whether any or all of them were false, and it is equally silent on the subject of the means, fraudulent or otherwise, used by plaintiff to secure the donation.

The record shows that the act was drawn by the notary at his office, under the direction of a reputable attorney retained therefor by the plaintiff, after which the officer proceeded to the house of the donor, accompanied by two witnesses and by the plaintiff.

After their arrival at the house, plaintiff went into the room of his aunt, who was sick in bed, and remained with her more than half an hour, after which the officer and the witnesses were introduced, and the act was then signed after being read to the donor and other persons present, including defendant's wife.

In all of these proceedings we fail to discover even an intimation of any fraudulent design or unfair dealing on the part of plaintiff or of anyone acting in his behalf.

The only attempt made by defendant to prove circumstances tending in the least to invalidate the donation, was by means of his own testimony consisting mainly of statements made to him by his aunt to the effect that she had signed the act in ignorance, and that her intention was, as it had always been, to leave the whole property to him.

But his recital is silenced by his own acts, which speak louder than his words. The act was signed on the 14th of June, and the deceased lived until the 28th of August following, and no step was taken by either to carry out her supposed intentions; or to expose the alleged deceits and fraudulent deeds of the other brother.

IV.

The alleged ignorance of the deceased of the English language is not supported by the record.

The very will under which defendant bases all his claims and rests his hopes of success, was drawn in the English language under her directions given in that language to her attorney. On that point the evidence is simply overwhelming against the pretensions of the defendant. Upon the whole, we feel constrained to say that it would be difficult to imagine a weaker attack on an authentic act than the one which is exhibited in this record.

The district judge reached the same conclusions, and rendered judgment recognizing plaintiff's title, and ordering a partition in kind of the property in suit. His judgment is silent on the amounts claimed in reconvention by the defendant. His silence must be construed in law as rejecting the same. 36 Ann. 398, Villars vs. Faivre et al.

As the evidence is insufficient to support the demand, we think that it was correctly ignored.

We note a motion made in this Court by plaintiff for an amendment of the judgment so as to allow time rent on the half of the property from the death of the donor until he obtains possession of the same. When his counsel filed this motion, he doubtless thought that he had made demand for such rent in his pleadings. Such, however, is not the fact, and hence he must enforce his claim by some other proceedings.

Judgment affirmed.

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No. 1159.

R. B. TODD, CURATOR, VS. MRS. M. T. LARKIN ET AL.

This suit is an attack by a creditor upon titles of third persons, on the ground that they are pure simulations, and that the property belongs to the debtor and is subject to his debts. On the evidence the simulation is not established to our satisfaction.

A PPEAL from the Sixth District Court, Parish of Morehouse.
Dunn, judge ad hoc.

David Todd and Bussey & Naff for Plaintiff and Appellant:

1. Good faith is essential in a person pleading prescription of ten years to real estate, under a title. C. C. 5479.
2. A judgment is not prescribed till ten years after the date of the adjournment of the term of court wherein the judgment is rendered. Page 555; 29 Ann. 515; 35 Ann. 285.
3. Service of citation on one obligor *in solido* stops prescription against the other obligors *in solido*, or the heirs of such obligors. C. C. 3552; 29 Ann. 298; 26 Ann. 608; 30 Ann. 498.
4. A judgment of separation of property is null, if the wife does not pursue her husband's property by an uninterrupted suit to collect her debt, till it is collected or all of his means are exhausted. C. C. 3428; 34 Ann. 690; 27 Ann. 193; 28 Ann. 151, 346.
5. An act of giving in payment from a husband to his wife must be an authentic act. C. C. 2428.
6. When a fraudulent simulation is made, and all of the debtor's creditors are afraid or unwilling to go to the expense and trouble of procuring the evidence and instituting and prosecuting a suit in declaration of simulation, the creditor who goes to this expense and trouble and succeeds in unveiling the simulation, and having the property decreed the property of his debtor, is entitled to be paid out of the proceeds of such property to the prejudices of all creditors who failed to bring such a suit. 9 R. 29; 8 Ann. 453.
7. One cannot claim by reconvention what one is estopped from demanding in a direct action.
8. In a suit in declaration of simulation where it is shown that no money passed, the transaction will be annulled. 1 Ann. 42; 10 Ann. 691; 12 Ann. 666.

Boatner & Boatner for Defendants and Appellees.

The opinion of the Court was delivered by

FENNER, J. Plaintiff is the holder of a judgment against Porter J. Larkin, deceased, rendered in 1875, and recorded in Morehouse parish on November 17th of that year.

In January, 1883, Porter J. Larkin transferred, by an act of sale, to his brother, M. K. Larkin, a certain plantation in said parish; and on March 29th, 1876, M. K. Larkin executed an act of sale of the same property to Mrs. M. T. Larkin, wife of Porter J. Larkin, separate in property.

The object of the present action is to have the foregoing transfers declared to be pure simulations, and to have the property decreed to have been, and to be, that of Porter J. Larkin and his heirs, and to be subject to plaintiff's judicial mortgage.

It is to be noted, as an important fact, that on May 29th, 1873, Mrs.

M. T. Larkin had obtained a judicial separation of property from her husband, Porter J. Larkin, and a judgment against him for \$11,513.47, with legal mortgage on all his property, then duly recorded, and operating as a legal and judicial mortgage, ante-dating by several years that of plaintiff, and this judgment has been duly kept alive and reinscribed.

We fail to find evidence in this record which would justify us in pronouncing simulated titles which have stood unimpeached for so long a time.

All the parties to these conveyances were dead at the time of the trial of this case, except M. K. Larkin. Porter J. Larkin had died in —. Mrs. M. T. Larkin, though alive at the date of institution of this suit, died before issue joined.

The testimony of M. K. Larkin was taken under commission issued by plaintiff, but proving unsatisfactory, plaintiff did not offer it, and defendants introduced it in evidence.

That testimony is positive to the effect that the sale to M. V. Larkin was a real transaction; that Porter J. Larkin desired and intended to sell and induced M. K. to buy; that the consideration was \$4,000, for which four notes of \$1,000 each were given; that he only consented to buy, however, to oblige his brother and upon a verbal understanding that, if he should be unable to pay his notes, his brother would not foreclose, but would return them and take back the place. But his right to pay the notes and keep the property was unquestioned and, in law, his obligation was equally absolute, if insisted on by Porter, because the above verbal understanding was of no legal effect.

It is impossible to treat such a contract as a simulation, because under it Porter Larkin's ownership was absolutely divested and M. K. Larkin acquired the unconditional right to keep the property on paying the price, which is all that, under the effect of the resolutive condition, any vendee acquires.

It is quite possible that Porter's object in selling and M. K.'s motive in consenting to buy, were to put the property beyond the reach of creditors; but this would only subject the transaction to the revocatory action, which is long since prescribed. It is the necessity of plaintiff's case to establish, not fraud, but simulation.

The only rebuttal of this testimony consists of circumstances and presumptions which, however powerful in themselves, find an explanation upon the hypothesis of a fraudulent contract, as complete as upon that of simulation.

So much for the first transfer. Now, in March, 1876, M. K. Larkin,

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being desirous to sell back the property, found his notes in the hands of Mrs. Larkin, then separate in property from her husband. How she acquired them, on what consideration and for what purpose is not shown.

This failure of proof is not the fault of defendants, their mother and father having both died during the long delay which plaintiff suffered to elapse in sleeping on his rights.

At all events, she held the notes and was legally capable of owning and dealing with them in her separate right.

M. K. Larkin applied to her to buy the property in consideration of the notes. She at first declined to do so, but ultimately consented, and the conveyance to her was executed.

From what we had just said, it is apparent that this was a real transaction, the effect of which was to transfer the title from the real owner for a valuable consideration.

But plaintiffs contend that she was a mere person interposed paying for the property with her husband's means and receiving and holding it for him.

But this is mere assumption and not supported by any weighty proof and loses even its plausibility when it is considered that she was then the holder of the superior mortgage, legal and judicial, against her husband, for an amount equal to the value of the property, to which the property, if acquired by the husband, would be instantly subjected.

What motive, then, for disguise or simulation? How natural, then, that all parties should have intended that the title should pass to the wife, as a real title and as the true owner! If such was the intention, and we are convinced that it was, the wife's title could not be attacked as a simulation, even if the husband had given the notes to her without consideration. The gift of the notes might possibly be the subject of attack under proper conditions, and fraud on creditors might be invoked, but it would be impossible to treat the title as a mere simulation.

We have considered all the circumstances of the case very carefully; but the title to property which has subsisted so long without question, and which was made to a party who, at the time of taking it, held the first mortgage upon it equal to its value, is not to be lightly treated as a simulation.

All the aversion which the judicial conscience rightly feels against

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devices to screen and cover up property under fictitious appearances, loses its force in presence of such a state of facts. The property has gone to the one who had the best right to it; and, except upon clear proof, neither law nor equity would justify our interference with it.

Such was the conclusion of the judge *a quo*, and we approve it.

Judgment affirmed.

Todd, J., is recused.

 No. 1160.

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1. In a suit against a married woman, appertaining to her separate property-rights, demands respecting the community cannot be determined.
2. A judgment in a previous suit against her by some plaintiff, annulling a sale made to her ostensibly of that part of the property claimed in the present suit by plaintiff, and "putting the parties in the condition they stood prior to the transaction," *forma res adjudicata* with respect to the parties, and will protect a title she may receive under judgment of partition.
3. Plaintiffs' want of authority to institute suit must be specially urged by way of exception *in limine litis*, or it will not prevail.

A PPEAL from the Fifth District Court, Parish of Ouachita.
 Richardson, J.

Stubbs & Russell for Plaintiffs and Appellants.

Stone & Murphy and *C. J. & J. S. Boatner* for Defendant and Appellee:

In order that a party may be held bound by a judgment, it is necessary: 1st. That he should have been sued and judgment prayed for against him. 2d. That judgment should have been rendered actually and in terms against him. 3d. That such prayer should have been made, and such judgment rendered against him in the same quality in which he is sought to be bound under it. R. C. C. 2286.

Judgments must be read and construed with reference to the parties suing and being sued; and the issues presented for adjudication, and cannot be given effect to decide other issues, upon which no evidence was taken, upon another cause of action not set forth in the pleadings, and at variance with and precluding the cause of action set up in the pleadings, even as between the parties, nor can they decide any issue whatever against a party not sued. Where, in a suit against a married woman, demanding the unpaid balance of the purchase price of property sold nominally to her, authorized by her husband and demanding also recognition of mortgage granted in her name upon her separate property as additional security for the notes evidencing the purchase price of the property conveyed, she resists the demand and is released on the ground that the sale was made to and the unpaid balance is due by the community, and that therefore neither she nor her individual property can be held liable, and when the court, in rendering judgment, releasing her and her individual property on the ground stated says, in terms: That the sale and mortgage incident thereto are null and void. Such judgment will be read with reference to the parties and the issues involved in the suit, and such expres-

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sions construed to mean that the sale was of no effect as to the issues between plaintiffs and defendant in said suit; and the mortgage referred to to mean the mortgage given in the name of the defendant upon other, her individual property, and not as a judgment against the community not sued granting rescission of sale not prayed for. The more especially where the notes evidencing the balance of the purchase price of the property conveyed are left outstanding and the husband declared, in the opinion confirming such judgment, to be the party liable for the balance due upon these notes, and where neither the notes nor the vendor's lien upon the property conveyed securing them are cancelled, or in anywise affected by the judgment, and where the community was not a party to the suit and the judgment was, in terms, against the wife alone, who cannot represent or stand in judgment for either the community or the husband, as to both of whom she is a third party, and when the cause of action necessary to a judgment rescinding the sale was not set forth in the pleadings, and when no evidence was offered thereon, and where, if such cause of action had been set up, it would have been in conflict with and precluded by the cause of action and the only one which was set forth in the pleadings. R. C. C. 2286; C. P. 119; *Bonvillian vs. Bourg*, 16 Ann. 363, and authorities there cited; *Freeman on Judgments*, 3d ed., § 271, 272; 20 Ann. 170; 27 Ann. 366, *Lebauve vs. Slack*; 31 Ann. 140-1—construing judgment reported. 28 Ann. 296-7.

In order for judgment to bind the community, the community must have been a party to the suit. The wife cannot stand in judgment for the community. Whatever the terms of a judgment might be, it could not affect the community unless given against the husband, the only person through whom this ideal third person could be reached, and the only person in whose name judgment could be rendered against it. R. C. C. 2404; 24 Ann. 295; 28 Ann. 624.

The object of the prayer for general relief is to cover vague allegations or omissions in pleadings upon matters germane to the issues presented, but not to authorize a judgment upon issues not raised, and as to which no evidence was introduced against a party not sued.

Nor could it under any circumstances, even as between the parties, have effect to authorize the granting of relief not prayed for upon a cause of action not set forth, and upon which no evidence was introduced so contrary to the cause of action set forth and the relief asked that by special statute parties are prohibited from joining the two demands in the same suit, the one cause of action precluding the other, under C. P. Art. 149. It is, therefore, clear that plaintiffs could not obtain, under prayer for general relief, a judgment giving relief which they could not have been heard to ask for by special prayer, even in the alternative. *Syer vs. Bundy*, 9 Ann. 541; 10 Ann. 23; 2 R. 313; R. C. C. 2286; C. P. 149.

A party sued for rents and revenues of all and for proceeds of sale of part, and for partition of remainder of property alleged to be owned jointly and in indivision by plaintiffs with defendant may except that the party suing is not owner and is without interest or capacity to stand in judgment, for if these allegations be true, payment to plaintiffs would not discharge the debt if owing, and partition with plaintiffs would give no title to all of the part drawn in partition even if completed in due legal form.

Where a married woman is sued for proceeds of sale of part and for rents and revenues of the remainder of property bought by the community in her name, and from liability for the purchase price of which she has been released by judgment (34 Ann. 976) on the ground and for the reason that the purchase was not made by her but by the community and when it is admitted that the property in question was always administered by the husband as head and master of the community, and that the proceeds of the part sold; and the rents and revenues of all the property in question, had always been received by the husband and used for the benefit of the community, the wife is not liable. To hold otherwise would be in violation of every principle of marital law bearing upon this question.

The opinion of the Court was delivered by

WATKINS, J. John W. Scarborough as the administrator of the estate of Mary B. Mason, deceased, and as curator of the estate of Alice T. Mason, an interdict, alleges that said estates are the joint owners of one undivided half interest in a plantation adjoining the city of Monroe, on the south, and known as the Big Place, comprising 863 31-100 acres, worth in 1871 and now \$25,000, by inheritance from their mother, Mrs. Hannah Mason, nee Bey; the other half being, by inheritance, the property of Mrs. M. T. Layton, wife of Robert Layton.

Plaintiff represents that in pursuance of an order of court the father and natural tutor of the two heirs whose estates he represents caused their half interest to be sold for \$27,000—all on time—with mortgage and vendor's lien retained, to their co-owner, Mrs. M. T. Layton, who gave her notes.

On these notes sums had been paid, aggregating \$9,471, when suit was brought to enforce the collection of the balance due, in which a final judgment was rendered releasing Mrs. M. T. Layton from all liability thereon, but annulling the sale, and restoring the property, as will appear by reference to the suit of Forbes, executor, vs. Mrs. M. T. Layton, 34 Ann. 975.

Plaintiff claims that Mrs. Layton has had possession, and enjoyed the revenues of said plantation since 1871, worth \$2,000 per annum, and during the time the title stood in her name she sold off building lots for sums aggregating \$4,550, and the estates he represents are entitled to one-half thereof—\$2,275, or a total amount due to them for revenues and sales of \$17,275, and he demands a partition of the real estate by licitation and a settlement of rents, and the proceeds of sales.

Mrs. Layton, in her individual right, appears and excepts on the ground that plaintiff, as the representative of the parties named, is not owner of the property in controversy, and has no capacity to stand in judgment, and shows that by virtue of the sale of 1871, all the right, title and interest of the persons named in said property was sold to Robert Layton, her husband, who owns same and the use of her name as purchaser—but who was without the legal capacity to purchase—did not prevent the legal effect of said sale on the divestiture of their title, and its investiture in the community then and now existing between her and her husband, Robert Layton, and she prays that plaintiff's suit be dismissed.

She urges as an estoppel against the assertion of her liability for revenues and the proceeds of certain sales, certain judicial admissions

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of plaintiff, in his same capacity, made in the suit of Forbes vs. Mason, to the effect that said property had at all times been under the administration of her husband, and which she now affirms in her answer to be a fact.

She pleads the general issue, claims the ownership of one undivided one-half interest in the property; denies that same was ever under her separate administration and control, and consequently any responsibility for the revenues; and pleads the prescription of one, three, five and ten years in bar of plaintiff's action.

In the petition Robert Layton was mentioned only as being the husband of defendant, and as such he was cited.

"When one intends to sue a married woman for a cause of action relative to her own separate interest, the suit must be brought against her and her husband." C. P. 118.

The husband was not otherwise named or cited as a defendant. The community is, therefore, not before this court, and the wife has no authority to represent it, or to stand in judgment for it. Hence, we need not notice the assignment of error filed in this Court. In this manner new issues cannot be engrafted on this suit, nor a judgment of this Court—which, in so far as he is concerned, was *res inter alios acta*—be assailed!

This view dispenses us from any consideration of the claim of title in the community, and of its incidents, embracing the demand for the sum of \$9,471 paid on the price of sale in 1871. 24 Ann. 295; 28 Ann. 624; R. C. C. 2404.

If the community is not a party for one purpose, it cannot be for another—if not in respect to the title, it cannot in respect to any part of the revenues of the property sought to be partitioned.

Plaintiff's right to recover same of Mrs. Layton depends upon the proper averment and proof of her having operated and used this property. This has not been done—could not be done. For if she was not purchaser, in her paraphernal right, it could not have been legally under her administration, and she could not be chargeable with its revenues, nor an account demanded of her for them. 36 Ann. 511, Succ. of Boyer.

In *Forbes vs. Layton* the Court said: "There was judgment, relieving the defendant from the debt, annulling the sale, and putting the parties in the condition they stood prior to the transaction." This judgment was affirmed. 34 Ann. 976.

For a like reason we are also dispensed from passing upon defend-

ant's pleas of prescription urged against the money demands of plaintiff.

Prescription does not run against the action for partition, nor the settlement of accounts. R. C. C. 825; 14 Ann. 740; 16 Ann. 170; 12 Ann. 354, Aiken vs. Ogilvie.

The *argument* of counsel that the decree of this Court in Forbes vs. Layton, was *ultra petitionem*, cannot be noticed. It was and is a valid and binding judgment, and between the parties, forms *res adjudicata*. R. C. C. 2286; 16 Ann. 365, Bouvillain vs. Bourg.

On this theory defendant has shown herself without interest to dispute plaintiff's title—the judgment in Forbes vs. Layton will protect her title under a partition made under a decision in this suit.

Defendant's exception that "plaintiff, as the representative of the parties named," is without capacity to stand in judgment was properly overruled by the district judge, and the same objection assigned as error in this Court is unavailing.

John W. Scarborough is the duly qualified administrator of the succession of Mary B. Mason, deceased, and curator for the estate of Miss Alice T. Mason, his appointment having been duly recommended by a family meeting and their proceedings duly homologated, as the evidence attests, and his capacity to stand in judgment is fully verified. The defendant did not except that the curator had not been "specially authorized by the judge, on the advice of the family meeting," to institute this suit, and that objection cannot be inferred.

It is, therefore, ordered and decreed that the judgment appealed from be affirmed, in so far as same relates to the partition of the property; and that same be annulled, avoided and reversed in all other respects—parties to pay costs of appeal ratably.

But we will reserve the right of all parties to have their respective claims determined in some proper proceeding.